



THE ARMY LAWYER

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Reviewed by Major Justin Moore

Blood Year: The Unraveling of Western Counterterrorism

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Lore of the Corps

Military Justice in Turmoil: The Ansell-Crowder Controversy of 1917-1920

By Fred L. Borch

Regimental Historian and Archivist

While judge advocates today might think otherwise, calls for changes to the military justice system are nothing new. What follows is a brief look at the first major—and public—controversy about the proper role of the commander in the military criminal legal process and how courts-martial should be structured and operate. Major General Enoch H. Crowder, the Judge Advocate General (tJAG) between 1911 and 1923, generally favored the status quo, although he conceded that some changes to the Articles of War (the predecessor of the Uniform Code of Military Justice (UCMJ)) were necessary. Brigadier General Samuel T. Ansell, the Acting Judge Advocate General between 1917 and 1919, however, wanted radical reform. His fundamental disagreements with Crowder about the future of the court-martial system resulted in what has been called the ‘Crowder-Ansell Dispute.’¹

Shortly after the United States entered World War I in April 1917, the War Department appointed Major General Crowder to be the Provost Marshal General in addition to his duties as tJAG. As Provost Marshal General, Crowder was tasked with implementing the Selective Service Act of 1917, the first wartime draft since the Civil War.² This was a huge undertaking, and required Crowder to supervise the registration, classification and induction of nearly three million men into the armed services. Crowder soon decided, however, that he could not be both the Army’s top lawyer and what today would be called the Director of Selective Service. The result was that then Lieutenant Colonel (LTC) Samuel T. Ansell was promoted to brigadier general and made the Acting Judge Advocate

General of the Army. While Crowder remained tJAG, Ansell took over the day-to-day operations of the Office of the Judge Advocate General. He not only oversaw the delivery of legal service in the War Department, but wrestled with the rapid expansion of the JAG Department; from 17 judge advocates in 1917 to 426 officers by the end of 1918.³



Major General Enoch H. Crowder, *The Judge Advocate General and Provost Marshal General*, ca. 1919

Within months of Ansell assuming duties as Acting tJAG, two courts-martial occurred that convinced him that changes to the Articles of War were required. In September 1917, a group of between twelve to fifteen enlisted Soldiers at Fort Bliss were court-martialed for mutiny when they refused an order to attend a drill formation. The accuseds, who had been “under arrest” for minor disciplinary infractions when ordered to drill, refused the order because an Army regulation provided that non-commissioned officers (NCOs) under arrest should not attend drill. The court-martial arose because a young officer insisted that the NCOs attend drill, and when they refused to obey the order, he had them court-martialed for mutiny. All were found guilty and sentenced to be dishonorably discharged and given jail terms ranging from ten to twenty-five years.⁴

After the cases were reviewed, approved and ordered executed by the convening authority, the records of trial in these “Texas Mutiny Cases” were sent to the Office of the Judge Advocate General for review as required by section 1199 of the Revised Statutes of 1878. That provision stated that:

the said Judge Advocate General shall receive, revise, and have recorded the proceedings of all

¹ Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1-45 (1967).

² Selective Service Act of May 18, 1917, ch. 15, 40 Stat. 76.

³ JUDGE ADVOCATE GEN.’S CORPS, U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975*, at 116 (1975).

⁴ Brown, *supra* note 1, at 1, 4.

courts-martial, courts-of-inquiry, and military commissions, and shall perform other such duties as have been heretofore performed by the Judge Advocate General of the Army.⁵

It was Brigadier General Ansell's view that section 1199 gave him the authority to set aside the findings and sentences in the Texas Mutiny Cases, based chiefly on his conviction that an Army regulation in fact prohibited enlisted soldiers 'in arrest' from performing drill. When Major General Crowder heard that Ansell was attempting to reverse the results of the Fort Bliss courts-martial, he told Secretary of War Newton Baker that section 1199 provided no such authority and that Ansell was wrong.⁶

While Ansell and Crowder disputed the true meaning of section 1199, a second court-martial, convened at Fort Sam Houston, Texas, brought the Ansell-Crowder controversy into sharper—and much more public—focus.

After the War Department decided to build a training camp near Houston, Texas, a battalion of Soldiers from the all-African American 24th Infantry Regiment were deployed to act as guards for the construction site. During the summer months of 1917, there were frequent confrontations between the black Soldiers and the white residents of Houston. From the outset, the Soldiers resented the "Whites Only" signage prevalent in Houston. They also were infuriated by the use of the N-word by white townspeople, and this slur provoked angry responses from the Soldiers. The troopers also came into conflict with the police, streetcar conductors, and other passengers when they refused to sit in the rear of Houston streetcars. More than a few Soldiers were arrested by the police as a result of these run-ins with local citizens, and often these arrests were accompanied by beatings or other mistreatment.⁷

On August 23, 1917, two black Soldiers were arrested by white police officers for disorderly conduct. While they were subsequently released, the rumor back at the training camp was that one Soldier had been killed by the police. Although their battalion commander urged them to remain calm and stay in the camp, the Soldiers were so angry that they took their Springfield rifles and marched toward Houston. When they entered the city, the infantrymen fought a series of running battles with the police, local citizens, and National Guardsmen, before disbanding, slipping out of town, and returning to camp.

After about two hours of rioting, fifteen white citizens were dead (including four Houston police officers); some of the dead had been mutilated by bayonets. Eleven other civilian men and women had been seriously injured. Four

Soldiers also died. Two were accidentally shot by their fellow troopers. A third was killed after he was discovered hiding under a house after the riots. Finally, the leader of the alleged mutineers, a company acting first sergeant, apparently took his own life—most likely because he had some idea what faced him and the other African-American troopers who had taken part in the riot.⁸

A little more than two months later, on November 1, 1917, a general court-martial convened at Fort Sam Houston began hearing evidence against sixty-three Soldiers who allegedly had participated in the riot in Houston. All were charged with disobeying a lawful order (to remain in camp), assault, mutiny, and murder. The accused—all of whom pleaded not guilty—were represented by a single defense counsel.⁹



Brigadier General Samuel T. Ansell, Acting Judge Advocate General, ca. 1918

The trial lasted twenty-two days and the court heard from 196 witnesses. The most damning evidence came from the testimony of a few self-confessed rioters, who took the stand

⁵ Act of June 23, 1874, ch. 458, sec. 2, 18 Stat. 244.

⁶ JUDGE ADVOCATE GEN.'S CORPS, *supra* note 3, at 128-29.

⁷ GARNA L. CHRISTIAN, BLACK SOLDIERS IN JIM CROW TEXAS 1899-1917, at 145 (1995). For more on the Houston Riot cases, see Fred L. Borch, *The*

Largest Murder Trial in the History of the United States": The Houston Riots Courts-Martial of 1917, ARMY LAW., Feb. 2011, at 1-3.

⁸ CHRISTIAN, *supra* note 7, at 153, 172.

⁹ *Id.* at 162.

against their fellow Soldiers in return for immunity from prosecution. The lone defense counsel (who was not a lawyer) argued that some of the men should be acquitted because they lacked the requisite *mens rea* required for murder or mutiny. He also argued that the government had failed to prove its case ‘beyond a reasonable doubt’ against some of the accuseds.¹⁰

When the trial finished in late November 1917, the court martial panel acquitted five accuseds. Of the remaining Soldiers, thirteen were sentenced to be hanged and forty-one were sentenced to life imprisonment. Only four Soldiers received lesser jail terms.¹¹

On December 9, 1917, the accuseds were informed that the convening authority had taken action in their court-martial, and that he had approved the sentences as adjudged. Two days later, on December 11, 1917, the thirteen condemned men were hanged at sunrise. It was the first mass execution since 1847.¹²

When the record of trial in the case reached General Ansell, he was outraged. As he later testified before the Senate Committee on Military Affairs,

The men were executed immediately upon the termination of the trial and before their records could be forwarded to Washington or examined by anybody, and without, so far as I can see, any one of them having had time or opportunity to seek clemency from the source of clemency [the convening authority], if he had been so advised.¹³

In the immediate aftermath of the Houston Riot cases, General Ansell insisted once again that Section 1199 gave him the authority to take “revisionary action on court-martial records.”¹⁴ He also stressed that the carrying out of thirteen death sentences on December 11, 1917, without any opportunity for the condemned men to ask for clemency or reconsideration, was proof that the War Department must take action to prevent any such future injustice. As a result of Ansell’s agitation, Secretary of War Newton Baker issued General Orders No. 7 on January 17, 1918. It prohibited the execution of any death sentence before a review and a determination of legality the by Judge Advocate General. As a result of General Orders No. 7, General Ansell established Boards of Review, which had duties “in the nature of an

appellate tribunal.”¹⁵ The Boards were tasked with reviewing records of trial in all serious general courts-martial, and while their opinions were advisory only, the Boards of Review were the first formal appellate structure in the court-martial process.¹⁶

While Ansell was pleased with General Orders No. 7, he saw this measure as only the first step of many that were needed to reform the military criminal justice system. Supported by Senator George E. Chamberlain of Oregon, “General Ansell launched his public campaign for revision of the Articles of War, establishing himself as the standard bearer for the reformation of military justice.”¹⁷

Among his many proposals—some of which were truly revolutionary for the time—were:

- Punitive provisions in the Articles of War should be rewritten to define each offense with “sufficient particularity;”¹⁸
- Statutory penalties should be specified for each offense;
- No charge should be referred for trial until the officer with summary court-martial jurisdiction over the accused had made an preliminary investigation of the charge, and gave the accused the right to make a statement or present evidence;
- No charge should be referred to trial unless an officer of the JAGD certified in writing that the charge was legally sufficient and there was *prima facie* proof of guilt.

At the time, the 1916 Articles of War did not clearly define the elements of an enumerated offense, and a court-martial panel had wide discretion when it came to punishing an accused. Ansell wanted more clarity and specified punishments. As for Ansell’s preliminary investigation proposal, the Articles of War did not require such an inquiry. While it was true that paragraph 76 of the 1917 Manual for Courts-Martial (MCM) stated that any charge should be “carefully” investigated prior to referral, this was an MCM provision only and consequently could be changed by the Secretary of War at any time; Ansell wanted the requirement to be statutory.¹⁹ As for the last proposal, Ansell wanted to

¹⁰ JOHN MINTON, THE HOUSTON RIOT AND COURTS-MARTIAL OF 1917, at 16 n.d (1990).

¹¹ JUDGE ADVOCATE GEN.’S CORPS, *supra* note 3, at 127.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 129.

¹⁵ *Id.* at 130.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Brown, *supra* note 1, at 35.

¹⁹ OFFICE OF THE JUDGE ADVOCATE GEN., WAR DEP’T, A MANUAL FOR COURTS-MARTIAL para. 76 (1917). It was not until the enactment of the Uniform Code of Military Justice in 1950, and the publication of a *uniform* Manual for Courts-Martial (MCM) in 1951, that the entire MCM was “prescribed” by the president via an executive order. President Harry S. Truman prescribed the Manual for Courts-Martial, United States, 1951, on February 8, 1951, when he signed Executive Order 10214.

remove the commander as the sole decider as to when there should be a court-martial. He believed that inserting a lawyer into the process would prevent arbitrary and capricious decisions by a commander.²⁰

Other changes proposed by General Ansell included:

- General courts-martial would consist of eight members; special courts would have three members;
- Enlisted men would be tried by courts containing enlisted members; three on a general courts and one on a special court;
- The required vote for conviction would be increased from two-thirds to three quarters, with a unanimous verdict required before a death sentence could be imposed;
- A “court judge advocate” (a lawyer from the JAGD or else an officer specially qualified by reason of legal learning or judicial temperament) would sit with each court martial and would be akin to a civilian judge; he would rule on motions and questions of law, summarize the evidence and applicable law at the end of a case, and review findings for legal sufficiency, and impose any sentence.²¹

Under the 1916 Articles of War, a general court-martial could have between five and thirteen members, and a special court-martial between three and five members; Ansell wanted a fixed number of members because under the 1916 Articles of War, a convening authority could add (or remove) court members *during the proceedings*, if he so desired. Once again, Ansell thought a fixed number would guard against a commander’s manipulation of court membership during a trial.

The idea that enlisted personnel had a place on the panel was truly remarkable, as officer-only panels had been the rule since General Washington first convened courts-martial in the Continental Army during the Revolution. But Ansell thought that the time had come for an enlisted accused to have at least some enlisted members—his peers—sitting in judgment.

Just as revolutionary was General Ansell’s proposal that a court-martial needed a quasi-judicial official—and one who would have the power to impose a sentence. The ‘court judge advocate’ proposal was yet another way to limit the power of the commander in the judicial process. Ansell did not think the existing judgeless court was fair to an accused, since the prosecutor-judge advocate—who worked for the

commander—performed all the judicial functions. The legally-qualified court judge advocate would ensure that the proceedings were fuller and fairer.²² Additionally, by giving the power to sentence an accused to the court judge advocate, Ansell believed that justice would better served, and move courts-martial away from their focus on discipline at the expense of justice.²³

Two other proposals are worth mentioning. For the first time, General Ansell argued that the accused in a general or special court-martial had the right to be represented by military counsel *of his own choosing*. If the accused wanted to hire a civilian lawyer to represent him, and could not afford one, then the prosecutor-judge advocate would employ the civilian lawyer and pay his legal fees. If the accused were acquitted, he would owe nothing. If he were found guilty, however, Ansell proposed that the judge advocate “would be able to order a two-thirds deduction from the accused’s monthly pay.”²⁴

Finally, General Ansell proposed that Congress create a military appeals court of three civilian judges. This Court of Military Appeals (COMA) would consist of lawyers appointed by the President for life, with the pay and retirement equivalent to a judge on the U.S. Circuit Court of Appeals. The COMA would have limited jurisdiction, in that it could only hear general courts-martial cases in which the accused had been sentenced to death, a dishonorable discharge or dismissal, or confined for more than six months.²⁵ Ansell believed that lawyers who were not in the chain of command or otherwise part of the military establishment should be involved in reviewing court-martial convictions. His COMA not only established judicial review of serious courts-martial, but injected civilians into the process—a radical proposal given that the 1916 Articles of War contained no appellate structure whatsoever, much less any provision for civilian oversight of the military justice system.

All of General Ansell’s proposals were contained in Senator Chamberlain’s legislation to amend the 1916 Articles of War, which Chamberlain introduced in the Senate in late 1918. In a 1919 *Yale Law Journal* article, Professor Edmund Morgan described the reforms as follows:

Obviously the basic principle of the bill is the very antithesis of that of the existing court-martial system. *The theory upon which the bill is framed is that the tribunal erected by Congress for the determination of guilt or innocence of a person subject to military law is a court, that is proceedings from beginning to end are judicial, and that questions properly submitted to it are to be judicially determined.*

²⁰ JUDGE ADVOCATE GEN.’S CORPS, *supra* note 3, at 132.

²¹ *Id.* at 133-34.

²² *Id.* at 134.

²³ Brown, *supra* note 1, at 23-24.

²⁴ JUDGE ADVOCATE GEN.’S CORPS, *supra* note 3, at 134.

²⁵ *Id.* at 135.

As the civil judiciary is free from the control of the executive, so the military judiciary must be untrammelled and uncontrolled in the exercise of its functions by the power of military command.²⁶

Hearings were held on the legislation before the Senate Committee on Military Affairs throughout most of 1919, but the Chamberlain bill did not get sufficient traction to become law. First, with the war over, and Army demobilization underway, public interest in reforming the court-martial process dissipated rapidly. Second, Major General Crowder and the War Department were very opposed to most of Ansell's proposal, and successfully blocked the legislation from getting a vote in the House and Senate.²⁷

But a few of Ansell's reforms did emerge as amendments to the Articles of War in 1920. Chief among these was the creation of "law member," who would be appointed to sit on a general court-martial and who would rule on interlocutory questions and instruct the court on the presumption of innocence and the burden of proof. But the law member's rulings were final only in regards the admissibility of evidence; in all other matters he could be overruled by a majority vote of the court. Another major change was that, for the first time, the Articles of War required the tJAG to establish Boards of Review consisting of three or more officers who would review general courts-martial in which a discharge, dismissal or imprisonment had been imposed at sentencing.²⁸ This statutory change—inserted as Article 50 1/2 of the Articles of War—was the first legislative basis for an appellate court, and consequently was the forerunner of the Army Court of Military Review and Army Court of Criminal Appeals.

A few of Ansell's other proposed reforms also were enacted. A pretrial investigation now was required by law, and the accused was permitted to present evidence at such an investigation. The recommendations of the investigating officer, however, were not binding on the convening authority. Additionally, while Ansell's idea for enlisted personnel on the court was not enacted, Congress did give clear guidance to the convening authority about the qualities that a court member should possess: for the first time, the Articles of War required the commander to select officer panel members who were best qualified "by reason of age, training, experience, and judicial temperament."²⁹

The rest of Ansell's reform proposals—fixed numbers of members on courts, three quarters vote required to convict,

enlisted personnel on panels, lawyer defense counsel for an accused, a civilian COMA—were rejected by the Congress. Crowder and the War Department had won; Ansell had lost. With Crowder now back as tJAG, Ansell was reduced to his permanent rank of lieutenant colonel in March 1919; he resigned his commission and left the Army a short time later.³⁰

Ansell's ideas about military justice were not forgotten. His firm belief that there must be more limits on the role of the commander in the system, and that civilians must play a part in the process, were accepted by the Congress when it established a three civilian judge COMA as part of the UCMJ in 1950, and when it later created the position of the military judge in the Military Justice Act of 1968. Most importantly, the requirement that courts-martial be more like civilian courts was enshrined in Article 36, UCMJ. This provision requires that court-martial mirror, if practicable, the pre-trial, trial, and post-trial procedures, including modes of proof, used in U.S. District Courts.³¹

In retrospect, Crowder won the battle in 1920, but it was Ansell who ultimately triumphed in the war over the future of military justice in the 20th century. Just how this happened, however, is a story for another *Lore of the Corps*.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website
<https://www.jagcnet.army.mil/8525736A005BE1BE>

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

²⁶ Edmund Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L. J., 52, 73-74 (1919) (emphasis added).

²⁷ JUDGE ADVOCATE GEN.'S CORPS, *supra* note 3, at 135-36.

²⁸ *Id.* at 136-37.

²⁹ 1920 Articles of War, art. 4, 41 stat. 787 (1920); OFFICE OF THE JUDGE ADVOCATE GEN., WAR DEP'T, A MANUAL FOR COURTS-MARTIAL para. 6.(c) (1921).

³⁰ Ansell believed that his reduction in rank was in retaliation for his "outspoken opposition to the Articles of War and the administration of military justice." Brown, *supra* note 1, at 43. This may or may not have been true. Given that World War I was at an end, the Army was rapidly reducing in size, and Crowder had returned to full time duties as tJAG, it is possible that Secretary of War Newton Baker and the War Department decided that since Ansell was no longer Acting tJAG, his temporary rank of brigadier general was no longer appropriate.

³¹ UCMJ art. 36.

Zealous Advocacy, Professionalism, and the Military Justice Leader

Major G. K. Logan*

Leadership is solving problems.

The day soldiers stop bringing you their problems is the day you have stopped leading them.¹

I. Introduction

Military justice managers are leaders. They exist to develop, mentor, and assist their subordinate counsel. In the foreword to Army Doctrine Publication 6-22, Army Leadership, General Raymond Odierno charges leaders to “[b]e your formation’s moral and ethical compass.”² This duty is particularly true for the military justice manager. Judge advocates work in an occupational field governed by a specific code of ethics and professionalism. They have the responsibility of both advocating for their clients with zeal and the administration of justice within the bounds of the law and ethical rules.³ Zeal, the law, and ethical rules are broad, nebulous, and often difficult concepts to apply to a specific case. In practice, the boundary between competent advocacy and unethical conduct can quickly become blurred—particularly for inexperienced judge advocates.⁴ Recognizing this boundary is critical to the ethical and professional practice of law.

Equal parts leader and lawyer, military justice managers serve as the moral and ethical compass for their subordinates and guide them through difficult professional and ethical decisions. Successful military justice managers must themselves have a solid understanding of zealous representation and the relationship between it and legal ethics. They must also recognize common advocacy conduct that exceeds the bounds of the law and ethical rules. The proceeding discussion focuses on these areas.

The article will first define zealous advocacy. In defining zealous advocacy, an important distinction must be

drawn between the concept of zealous advocacy and the concept of a zealot. Next, the role of the military justice manager in teaching and mentoring ethical and professional practice is explored. An emphasis is placed on the topics of discovery and civility as areas where issues with zealous advocacy frequently manifest themselves. Finally, the opinion in *United States v. Stellato*⁵ is analyzed from the standpoint of both the trial counsel and military justice leadership; examples of misguided zealous advocacy and unprofessionalism in the case are discussed.

II. Zealous Advocacy

Zealous advocacy is the buzz word which is squeezing decency and civility out of the law profession. Zealous advocacy is the doctrine which excuses, without apology, outrageous and unconscionable conduct so long as it is done ostensibly for a client . . . Zealous advocacy is the modern day plague which infects and weakens the truth-finding process and makes a mockery of the lawyers' claim to officer of the court status.⁶

A. What is Zealous Advocacy?

The concept of zealous advocacy is illusive. Defining it in the context of trial advocacy is often paradoxical. Black’s Law Dictionary defines zealous advocacy as “[t]he doctrine that a lawyer acting as an advocate must, within the established bonds of legal ethics, maximize the [chances] that his or her client will have a favorable outcome.”⁷ The definition of zealous advocacy seems straightforward. Confusing the doctrine of zealous advocacy with the ideology of a zealot, however, creates problems for the practitioner.

A zealot is “someone who is an immoderate, fanatical, or overzealous adherent to a cause or ideal . . . The noun zealot has derogatory connotations that are much attenuated,

* Judge Advocate, United States Marine Corps. LL.M., 2016, The Judge Advocate General’s School, United States Army, Charlottesville, Virginia. J.D., 2008, Samford University; B.A., 2005, Auburn University. Previous assignments include Camp Foster, Okinawa, Japan, 2012–2015 (Post Trial Review Officer and Court Reporter officer-in-charge, 2014–2015; United Nations Military Observer, United Nations Mission Liberia, 2014; Company Commander, Company B, Headquarters and Support Battalion, Camp S. D. Butler, 2013–2014; Trial Counsel, 2012–2013) Marine Corps Recruit Depot, San Diego, California, 2009–2012 (Trial Counsel, 2010–2012; Legal Assistance, 2009). Member of the bar of Alabama. This article was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course.

¹ COLIN POWELL, MY AMERICAN JOURNEY (1995).

² U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP foreword (1 Aug. 2012) (C1, 10 Sept. 2012) [hereinafter ADP 6-22].

³ U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 6(b) (1 May 1992) [hereinafter AR 27-26].

⁴ Captain John S. Cooke, *Ethics of Trial Advocates*, ARMY LAW., Dec. 1977, at 6.

⁵ *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015).

⁶ Allen K. Harris, *The Professionalism Crisis: The “Z” Words and Other Rambo Tactics*, 53 S.C. L. REV. 549, 569–70 (2002) (quoting Illinois Circuit Judge Richard Curry).

⁷ *Principle of Partisanship*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining zealous advocacy under the principle of partisanship).

if not absent altogether, in the cognates zeal and zealous.”⁸ The distinction between zealous advocacy and being a zealot is dramatic. It is so significant that an attorney simply cannot be a “zealot” in the context of representing their client.⁹ The conflation of the two concepts is a leading cause of professional and ethical misconduct.¹⁰ The evolution of the term zealous advocacy in professional and ethical rules highlights this conflation as a historical problem in the legal profession.

The term “zealous advocacy” is a holdout from Canon 7 of the ABA Model Code of Professional Responsibility, which was widely replaced in most jurisdictions by Rule 1.3 of the current ABA Model Rules of Professional Conduct.¹¹ Canon 7 was criticized precisely because “zealousness” might be interpreted as “zealotry,” and used as an excuse for wrongful lawyer conduct on behalf of a client or to imply a personal involvement in a client’s cause rather than a professionally detached commitment.¹²

The duty for judge advocates to represent a client’s interests with zeal comes from the rules of professional conduct (Service Rules) for the various services.¹³ The Service Rules are largely direct adaptations of the ABA Model Rules of Professional Conduct.¹⁴ Like our civilian counterparts, zealousness on the part of a judge advocate is always subordinate to legal and ethical regulations.¹⁵

B. Zealous Advocacy and the Military Justice Manager

As leaders, military justice managers occupy a unique and critical role in ensuring compliance with the Service Rules within the judge advocate community and preventing ethical misconduct by their subordinates. In a recent opinion

addressing prosecutorial misconduct, Judge Ohlson of the United States Court of Appeals for the Armed Forces (CAAF) in his dissenting opinion addressed the importance of the role of the military justice manager:

The nagging—if unspoken—question in this case is, “Where was the chief of justice?” As noted by the majority, trial counsel appeared to be not only “inexperienced” but also “unsupervised,” and she “repeatedly appeared unable to either understand or abide by the military judge’s rulings and instructions.” The issue of why this trial counsel did not receive the level of supervision, guidance, assistance, instruction, and training that she so obviously needed is not a matter before this Court. However, I find it appropriate to note that the responsibility to protect a service member’s constitutional right to a fair trial does not rest solely with the lone trial counsel advocating in the courtroom; it extends to the chief of justice and to other supervisory officers as well.¹⁶

New judge advocates are trained in law school to think like lawyers.¹⁷ Basic judge advocate training programs serve to introduce them to military law.¹⁸ Learning how to be a judge advocate, however, really begins at the first duty station.¹⁹ Without proper guidance from their military justice manager, inexperienced judge advocates may attempt to hide their insecurity and lack of experience through aggressive and belligerent conduct.²⁰ Judge advocates are most likely to commit an ethical violation at the time they are learning to balance advocacy with the Service Rules.²¹ Military justice managers must take an interested and active role assisting inexperienced judge advocates bridging the gap between the theoretical and practical—between law school and the courtroom.

Basic leadership principles provide military justice managers the means of ensuring compliance with the Service Rules and creating ethical judge advocates. The decisions any leader must make are seldom obviously wholly ethical or unethical.²² Making correct moral and

⁸ *Zealot*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁹ *Revson v. Cinque & Cinque, P.C.*, 70 F. Supp. 2d 415, 442, (S.D.N.Y. 1999) (“Although an attorney must represent his client zealously, he cannot be a ‘zealot.’”). See also *Minnesota v. Richardson*, 514 N.W.2d 573, 576 (Minn. Ct. App. 1994) (“An attorney at trial is an advocate and, as an officer of the court, cannot be a zealot.”).

¹⁰ *Harris*, *supra* note 6, at 568.

¹¹ *Id.* See MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (AM. BAR ASS’N 1980).

¹² George A. Riemer, *Zealous Lawyers: Saints or Sinners?*, OR. ST. B. BULL. 32 (Oct. 1998).

¹³ Major Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1, 14 (1989).

¹⁴ *Id.* See AR 27-26, *supra* note 3, para. 7(b); U.S. DEP’T OF NAVY, JAGINST 5803.1D, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL (20 Jan. 2015) [hereinafter JAGINST]; U.S. DEP’T OF AIR FORCE, INSTR. 51-110, PROFESSIONAL RESPONSIBILITY PROGRAM intro. (5 Aug. 2014) [hereinafter AFI 51-110].

¹⁵ AR 27-26, *supra* note 3, Rule 1.3 (Comment); JAGINST, *supra* note 14, Rule 1.3 (Comment).

¹⁶ *United States v. Hornback*, 73 M.J. 155, 165 (C.A.A.F. 2014).

¹⁷ Major Jack B. Patrick, *Judge Advocate Training and Learning: “Newbees” and the Boss*, ARMY LAW., Oct. 1985, at 7.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Kathleen P. Browe, *Comment: A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 762 (1994).

²¹ *Cooke*, *supra* note 4, at 2.

²² ADP 6-22, *supra* note 2, para. 26.

ethical decisions in difficult situations is a hallmark of character.²³ Character is a derivative of integrity.²⁴ The outward manifestation of integrity for a leader is unwavering adherence to laws, regulations, and standards; doing what is right legally and morally.²⁵ To make correct moral and ethical decisions in difficult situations, a military justice manager must recognize two important facts: the fundamental purpose of the military legal system is to promote justice and all judge advocates have a duty to genuinely treat with consideration the rights of all persons involved in the court martial process.²⁶ Only with that essential understanding can a military justice manager effectively assist their subordinates with navigating advocacy and the Service Rules.

Presence of leadership is vital for subordinates, particularly in ethically challenging and ambiguous situations.²⁷ It is the sum total of a military justice managers words, actions, and appearance.²⁸ Presence is how military justice managers convey the values of their personal identity they wish their subordinates to emulate.²⁹ To provide good leadership through ethically difficult situations, military justice leaders must know their subordinates, communicate with them, and understand the issues they are experiencing.³⁰

Finally, the intellect of a military justice leader is important to applying critical and innovative thought to the many issues their subordinates will encounter.³¹ Effective military justice managers know their own strengths and weaknesses and will reach out to peers and other resources to assist them with making a sound judgment.³² Critical and innovative thought allows military justice managers to transform knowledge into sound advice and guidance to their subordinates.³³ The combination of character, presence, and intellect results in a military justice manager who understands the obligations of his subordinates and

assists them with navigating the pitfalls of those obligations through leadership by example and effective communication.³⁴

Maintaining an ethical and professional office is in the personal and professional best interest of a military justice manager. Basic leadership doctrine tells us that leaders are always responsible for the decisions, actions, accomplishments, and failures of their subordinates.³⁵ Violations of the Service Rules by subordinates in certain circumstances may result in disciplinary consequences for supervisory counsel themselves.³⁶ Military justice managers have many responsibilities and it is understandable some triaging of their time and attention must be done. The areas of discovery and civility among counsel typically present the most issues with zealous advocacy and warrant more attention from a military justice manager.³⁷

C. Discovery

*If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.*³⁸

Law school teaches prospective lawyers the malleability of rules.³⁹ Advocacy and the Service Rules themselves require judge advocates to discover and exploit uncertainties and ambiguity in rules and the law to the advantage of the client.⁴⁰ Discovery, however, should not be considered an area where judge advocates can experiment with the boundaries of the rules.

The overall purpose of military law is to promote justice⁴¹ and courts-martial are truth-finding bodies.⁴² Discovery facilitates the truth-finding function of courts-martial.⁴³ Judge advocates should heed the basic concept

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. I, ¶ 3 (2016) [hereinafter MCM]; AR 27-26, *supra* note 3, Rule 4.4 (Comment) (“The duty of a lawyer to represent the client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.”).

²⁷ ADP 6-22, *supra* note 2, para. 26.

²⁸ *Id.* para. 28.

²⁹ *Id.* para. 27.

³⁰ *Id.* para. 28.

³¹ *Id.* para. 29.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-0, MISSION COMMAND para. 2-31 (17 May 2012) [hereinafter ADP-6-0].

³⁶ AR 27-26, *supra* note 3, Rule 5.1.

³⁷ See, e.g., Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don’t Work*, 74 AM. B. ASS’N J., 78 (March 1988); Harris, *supra* note 6, at 551; Browe, *supra* note 20, at 751.

³⁸ *Krueger v. Pelican Prod. Corp.*, No. CIV-87-2385-A (W.D. Okla. Feb. 24, 1989).

³⁹ W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 898 (1996).

⁴⁰ *Id.*

⁴¹ MCM, *supra* note 26 pt. I, ¶ 3.

⁴² AR 27-26, *supra* note 3, para. 6(f).

⁴³ Wendel, *supra* note 39, at 895.

“[d]iscovery does not belong to the adversary system.”⁴⁴ Discovery deals with facts and advocacy deals with the presentation of those facts.

Military justice managers, because they are often charged with supervising inexperienced judge advocates, must be particularly cognizant of discovery issues. They must remind subordinates that their professional obligation to the court supersedes the personal desire of a judge advocate to have their cause prevail.⁴⁵ Professionalism and respect for the court-martial process are not compatible with creative tactics when requesting, responding to, and litigating discovery.⁴⁶

As representatives of the sovereign, prosecutors must be especially cognizant of the importance of their professionalism in the realm of discovery. Rule 3.8 of the Service Rules—entitled “Special Responsibilities of a Trial Counsel”⁴⁷—states the following with regard to discovery:

A trial counsel shall . . . make timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the lawyer, except when the lawyer is relieved of this responsibility by a protective order or regulation.⁴⁸

Service Rule 3.8 simply amplifies other discovery obligations owed by prosecutors.⁴⁹ Discovery for the prosecutor is an ongoing truth-seeking endeavor, regardless of what the truth may be.⁵⁰ When dealing with discovery, military justice managers must emphasize a focus on ascertaining the truth over what may eventually be admissible at trial. Rules of evidence operate at trial.⁵¹ Information does not have to be admissible at trial to be discoverable.⁵² The sheer abundance of discovery rules, be they ethical, statutory, or case derived, send an unambiguous

message to prosecutors about discovery—turn the information over.

Defense counsel can likewise be tempted to abuse discovery in the name of zealous advocacy. Gamesmanship with the discovery process is not compatible with the Rules for Courts-Martial or ethical and professional practice.⁵³ Zealous advocacy is not an excuse for creative and misleading characterizations of fact nor is it an excuse for a lack of due diligence.⁵⁴ Filing of frivolous discovery requests, failing to conduct research into factual issues, sending prosecutors on a fishing expedition, and intentionally using court-martial procedure as a means of delay are unethical and violate the Service Rules.⁵⁵

D. Civility

*[D]o as adversaries do in law, [s]trive mightily, but eat and drink as friends.*⁵⁶

Civility between counsel is another victim of zealous advocacy. Civility is synonymous with professionalism.⁵⁷ Ethics, as discussed thus far in the paper, is distinguishable from the concept of civility. Ethics and the Service Rules tell judge advocates what they must do;⁵⁸ they direct a minimum standard of conduct below which we cannot fall. Civility and professionalism are the ideals judge advocates should aspire to achieve; they are what we should do.⁵⁹

Much like the concept of zealous advocacy, civility eludes precise definition. It encompasses a broad spectrum of behavior covering the simply rude all the way to the intentionally unethical.⁶⁰ Like the proper scope of zealous advocacy, civility is an area where experience plays a large role in understanding when conduct is approaching the unprofessional. Again, the military justice manager must set the example for their subordinates in this area and be engaged enough with them to know when they are straying into unprofessional conduct.

It is important military justice managers do this because the adverse effects of incivility can be pervasive.⁶¹ Incivility

⁴⁴ *Id.*

⁴⁵ *Id.* at 907–08; Jay M. Levin & Alicia M. Schmitt, *Balancing the Model Rules and Zealous Advocacy, Don't Step Over That Line*, THE BRIEF, Spring 2010, at 54, 60.

⁴⁶ Wendel, *supra* note 39, at 895.

⁴⁷ AR 27-26, *supra* note 3, Rule 3.8.

⁴⁸ *Id.*

⁴⁹ See MCM, *supra* note 26, R.C.M. 703 [hereinafter RCM]; UCMJ art. 46 (2016); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁵⁰ Harris, *supra* note 6, at 587.

⁵¹ *Id.* at 571.

⁵² *Id.*

⁵³ MCM, *supra* note 26, RCM 701 analysis, at A21-31 (2016); AR 27-26, *supra* note 3, Rule 3.4.

⁵⁴ Harris, *supra* note 6, at 574.

⁵⁵ Cooke, *supra* note 4, at 12.

⁵⁶ WILLIAM SHAKESPEARE, TAMING OF THE SHREW act 1, sc. 2.

⁵⁷ Joseph J. Ortego & Lindsay Maleson, *Incivility, An Insult to the Professional and the Profession*, THE BRIEF, Spring 2008, at 52, 54.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Browe, *supra* note 20, at 756.

between judge advocates quickly creates an unnecessarily acrimonious environment between military justice shops, an environment in which judge advocates are prone to push the limits of ethical responsibility in a misguided attempt to be zealous advocates.⁶² Common manifestations of uncivil and unprofessional conduct are frivolous requests and motions, delay tactics, threats and embarrassment, and all other manner of scorched-earth tactics.⁶³ A generalized lack of respect for persons involved in the court-martial process underlies this conduct.⁶⁴

Judge advocates who act unprofessionally have abandoned the interests of their client.⁶⁵ Uncivil conduct is an expression of base personal motivations and not any professional obligation. Lack of civility can lead to dissatisfaction with the profession on the part of counsel, unnecessary litigation, and a loss of respect for and confidence in the legal process by the public.⁶⁶

Use of unprofessional tactics by opposing counsel can create the temptation to respond in kind. Military justice managers cannot allow this mindset to take hold within their offices. It is possible to remain civil when one is aggressive, upset, angry, and intimidating.⁶⁷ Fulfilling the role of a calm and professional influence capable of reaching out to opposing counsel sets the right example for subordinate judge advocates. Failure to do so has very serious consequences.

III. *United States v. Stellato*⁶⁸

*The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.*⁶⁹

⁶² Major David L. Hayden, Major Willis C. Hunter & Major Donna L. Wilkins, *Training Trial and Defense Counsel: An Approach for Supervisors*, ARMY LAW., Mar. 1994, at 22. “[S]upervisors need to stress . . . the trial attorney’s responsibility . . . for frequent and expeditious coordination with judges and opposing counsel on all legal actions. Inviting judges and opposing counsel to office social events also can pay great dividends in the long run.” *Id.*

⁶³ Browe, *supra* note 20, at 755; Ortego & Maleson, *supra* note 57, at 58–59.

⁶⁴ Ortego & Maleson, *supra* note 57, at 58–59.

⁶⁵ *Id.*

⁶⁶ Browe, *supra* note 20, at 755.

⁶⁷ Harris, *supra* note 6, at 557.

⁶⁸ *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015).

⁶⁹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

The *Stellato* opinion showcases the consequences of misguided zealous advocacy and incivility. This case provides examples of discovery abuse, unprofessional conduct, and an apparent absence of supervision and mentorship. The trial judge dismissed the charges against the accused with prejudice.⁷⁰ The ruling of the trial judge was later upheld by CAAF.⁷¹ Both the trial court and CAAF found discovery violations by trial counsel to be “continual and egregious;” his approach to discovery “recklessly cavalier;” and his actions overall “an almost complete abdication of discovery duties.”⁷²

Stellato involved an Army reservist who allegedly molested his daughter.⁷³ Originally, civilian law enforcement received the report and investigated the allegations.⁷⁴ Civilian law enforcement seized a plastic banana, alleged to have been used in the assault, and the alleged victim was examined by a mental health professional.⁷⁵ The mental health professional determined the sexual assault allegation made by the alleged victim was inconclusive, as there was no evidence demonstrating the accused committed a sexual assault of his daughter.⁷⁶ Throughout the period of investigation, the accused and his wife exchanged a series of emails, wherein the accused continuously denied any misconduct.⁷⁷ The wife of the accused retained copies of these emails.⁷⁸

After the civilian investigation concluded without prosecution, the allegations were again made by the wife of the accused to Army Criminal Investigative Division (CID) and another investigation ensued.⁷⁹ The CID investigation failed to uncover the plastic banana, mental health records associated with the civilian investigation, or the emails between the accused and his wife.⁸⁰ The wife of the accused later identified a second alleged victim to CID.⁸¹ She claimed a friend of her daughter witnessed the previously

⁷⁰ *United States v. Stellato*, 74 M.J. 473, 476 (C.A.A.F. 2015).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 478–79.

⁸¹ *Id.* at 476.

alleged molestation and was herself molested by the accused.⁸²

At the conclusion of the military investigation, trial counsel and the special victim prosecutor conducted a site visit to the home of the alleged victim and her mother.⁸³ During the visit, the mother of the alleged victim informed the trial counsel of a box of evidence she gathered concerning the allegations.⁸⁴ Inside the box of evidence were notes of conversations she had with the alleged victim concerning the allegations, journals she kept concerning the allegations, correspondence between her and the accused about the allegations, and a note on which she recorded a recantation of the allegations by her daughter.⁸⁵

Trial counsel did not instruct the mother of the alleged victim to preserve any of the evidence contained in the box.⁸⁶ When later asked about the box of evidence by the court, trial counsel stated, “[The mother of the alleged victim] wanted to provide stuff [to me] and then have me make a judgment call on whether or not to turn it over to defense. And, I said I can’t do that, everything I get will go to defense.”⁸⁷ Charges were preferred shortly after trial counsel met with the alleged victim and her mother and after he was made aware of the box of evidence.⁸⁸ At the time of preferral, the Government provided the accused with some discovery, including the report of civilian law enforcement, the CID report, and the accused’s interrogations.⁸⁹ Trial counsel did not inform the defense of the existence of the box of evidence or its contents.⁹⁰

Shortly after preferral and the initial discovery disclosure by the Government, defense filed an initial discovery request seeking:

“exculpatory evidence, impeachment evidence, evidence within the possession of the Government material to the preparation of the defense, results of physical and mental exams of [the alleged victim] and [the mother of the alleged victim], all previous statements by

prosecution witnesses, and prior statements by the accused. This discovery request also sought preservation of evidence.”⁹¹

The contents of the box of evidence clearly contained material relevant to this request and trial counsel was aware of the contents of the box at the time of the defense request.⁹² Trial counsel consulted with his supervisory counsel, the chief of justice, and they decided not to respond to the defense discovery request until closer to referral of charges.⁹³ At some point near this time, trial counsel made comments to “the chief of client services that civilian defense counsel was ‘defending rapists,’ and he sent an e-mail to civilian counsel stating that she was ‘defending the guilty.’”⁹⁴

Trial counsel also had a troubled relationship with the special victim prosecutor detailed to the case. The court noted the “[special victim prosecutor] requested that [trial counsel] provide her feedback on his progress with the case relative to discussions with [mother of the alleged victim], but was repeatedly rebuffed to the point where she brought her concerns to both the former and current chief of military justice.”⁹⁵ Finally, the court noted an unusually familiar relationship between trial counsel and the alleged victim and her mother; evidenced by a dinner with the alleged victim and her mother, with subsequent confusion as to who paid for it, and a gift from the alleged victim’s mother to the wife of trial counsel.⁹⁶

The case continued for the remainder of 2013.⁹⁷ Throughout the year there were six judicial orders to compel discovery of witnesses and documents, and three continuances based on witness production and discovery issues.⁹⁸ The plastic banana was initially declared by trial counsel as “lost evidence.”⁹⁹ The banana was subsequently recovered from the evidence locker of civilian law enforcement and tests revealed none of the accused’s DNA.¹⁰⁰ The mental health professional who examined the alleged victim during the civilian investigation and determined there was no evidence to support the allegations

⁸² *Id.*

⁸³ *Id.* at 477.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 477–78.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *United States v. Stellato*, 74 M.J. 501, 507 (A. Ct. Crim. App. 2014).

⁹⁶ *Id.* at 506.

⁹⁷ *United States v. Stellato*, 74 M.J. 473, 477–78 (C.A.A.F. 2015).

⁹⁸ *Id.* at 482, 489.

⁹⁹ *Id.* at 479.

¹⁰⁰ *Id.*

died during the period of the continuances.¹⁰¹ The alleged witness and second victim were forensically interviewed and denied witnessing the allegations or being molested herself.¹⁰² After a change of trial counsel and the revelation of the “box of evidence” and its contents, the case was dismissed with prejudice by the trial judge.¹⁰³

In affirming the ruling of the trial judge, CAAF found five instances where the prosecution failed to comply with its discovery obligations.¹⁰⁴ First, “the Government violated the accused’s discovery rights when it did not investigate the existence of [the mother of the victim’s] mental health records following the accused’s discovery request.”¹⁰⁵ Second, “the Government failed to take the necessary steps in response to a defense request to preserve evidence.”¹⁰⁶ Third, “the ‘Government refused to produce a material witness and alleged victim.’”¹⁰⁷ Fourth, “the Government violated R.C.M. 701(a)(2)(A) by failing to comply in a timely manner with the defense discovery request to inspect [physical evidence].”¹⁰⁸ And finally, “the Government’s untimely disclosure and production” of “[a box which] contained exculpatory material, including a note about [the alleged victim’s] recantation of certain allegations and e-mails in which the accused denied the allegations of molestation.”¹⁰⁹

A. The Counsel

The actions of trial counsel in *Stellato* are indicative of a misinformed and misguided concept of zealous advocacy. The symptoms of a misinformed concept of advocacy, as previously discussed, are present: disregard for discovery obligations, a lack of civility toward other attorneys in the process, and an apparent personal stake in the case. The actions of trial counsel show a stronger desire to win than to do justice. The court concluded it had “grave concerns” about his conduct and “at a minimum it appears that his handling of his discovery obligations in [the] case was grossly negligent.”¹¹⁰

The record indicates trial counsel was generally aware of his discovery responsibilities as a prosecutor. He informed the mother of the alleged victim that any evidence she provided to him would have to be turned over to the accused.¹¹¹ Specifically, trial counsel testified “[S]he wanted to provide stuff [to me] and then have me make a judgment call on whether or not to turn it over to defense. And, I said I can’t do that, everything I get will go to defense.”¹¹² Trial counsel’s statement above is true, in part; however, it demonstrates a woefully incomplete understanding of his duties.

The mother of the alleged victim made trial counsel aware of the existence of additional evidence that was exculpatory for the accused. On this point, CAAF stated “a trial counsel cannot avoid discovery obligations by remaining willfully ignorant of evidence that reasonably tends to be exculpatory, even if that evidence is in the hands of a Government witness instead of the Government.”¹¹³ The comments by CAAF reinforce the truth-finding purpose of courts-martial and the need for the prosecutor to focus not on winning, but on ensuring justice is done.

Even a written ruling from the trial judge did not adequately drive home the point that trial counsel was treading on dangerous ethical ground. “In a written ruling . . . the military judge cautioned the Government that its decision to ‘take a hard stand on discovery . . . invites disaster at trial.’”¹¹⁴ “[Trial counsel] testified that he continued his efforts to provide discovery based on ‘what [he] deemed relevant and necessary.’ In his words, he ‘considered’ the military judge’s warning but ‘chose not to [review the government responses to the defense discovery request and answer with more specificity].”¹¹⁵

The conduct of trial counsel toward both defense counsel and the special victim prosecutor demonstrated incivility. His comments to the defense counsel served no professional purpose and his refusal to cooperate with the special victim prosecutor is inexplicable. By themselves, the comments could be dismissed as inexperience and natural competitiveness getting the better of a young counsel, but they were not isolated events. The totality of the circumstances in this case suggest the comments to defense and the relationship with the special victim prosecutor were symptomatic of a much greater problem with trial counsel’s understanding of professional advocacy and the court-martial process.

¹⁰¹ *Id.* at 480.

¹⁰² *Id.* at 479.

¹⁰³ *Id.* at 480.

¹⁰⁴ *Id.* at 482.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 485.

¹¹⁰ *Id.* at 489.

¹¹¹ *Id.* at 477–78.

¹¹² *Id.*

¹¹³ *Id.* at 487.

¹¹⁴ *United States v. Stellato*, 74 M.J. 501, 512 (A. Ct. Crim. App. 2014).

¹¹⁵ *Id.* at 512.

The record indicates trial counsel became too personally involved with the alleged victim and her mother. The dinner and exchange of a gift between the trial counsel and the mother of the alleged victim suggest a personal stake in the case. Although we encourage counsel to be empathetic toward victims, that empathy cannot compromise professional obligations. The danger here is trial counsel will become compromised by this personal involvement, placing personal interest before his duties as an officer of the court. The nature of this relationship also raises an appearance of impropriety issue.¹¹⁶ A judge advocate should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession.¹¹⁷ In the final analysis, any trial counsel must remember he or she is “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.”¹¹⁸

B. The Leadership

An analysis of the *Stellato* case is not complete without examining the involvement of the military justice leadership. Military justice managers must make reasonable efforts to ensure judge advocates under their supervision conform to the Service Rules and are adequately trained and competent to perform their duties.¹¹⁹ The conduct of trial counsel in *Stellato* undoubtedly fell below what is required by the Service Rules and he was certainly under the supervision of another judge advocate.

Two possible scenarios exist concerning the military justice leadership of the trial counsel in the *Stellato* case. Under the first scenario, the leadership could have been completely unaware of what the trial counsel was doing; trial counsel could have been a rogue actor hiding his actions and there was no way the leadership could have reasonably known of the issues in the case. In the second scenario, the leadership was aware of what the trial counsel was doing; knowledge of the actions of trial counsel is, at a minimum, tacit approval of his behavior.

The first scenario is the less likely of the two. It is difficult to imagine the attention of the chief of justice was not drawn to this case and this trial counsel after the lapse of a year after referral, six judicial orders to compel discovery of witnesses and documents, and three continuances.¹²⁰ To

the contrary, the involvement of the chief of justice in this case is evidenced early on by his discussion with trial counsel concerning the Government response to the initial defense discovery request and the decision to delay that response.¹²¹

That conversation, in the overall context of this case, carries with it the inference the trial counsel and chief of justice viewed discovery as a means of advocacy. In other words, the actions of trial counsel and the chief of justice in relation to the defense discovery request give the appearance of gamesmanship. Indeed, “gamesmanship” is a word CAAF specifically uses in the opinion to describe the overall actions of trial counsel concerning discovery.¹²²

In discussing the decision not to respond to the initial discovery request, CAAF also noted it was during the same pre-referral time period trial counsel “stated to the chief of client services that civilian defense counsel was ‘defending rapists,’ and he sent an e-mail to civilian counsel stating that she was ‘defending the guilty.’”¹²³ Additionally, there was the lack of communication between the special victim prosecutor and the trial counsel. From the record, this issue was clearly brought to the attention of the chief of justice.¹²⁴ The comments to defense and the existence of this troubled relationship between trial counsel and the special victim prosecutor should have served as an indication something was not right with the case and warranted some investigation or intervention on the part of the military justice leadership.

By themselves, each individual issue in *Stellato* could be regarded as an anomaly. All the actions of trial counsel, however, did not occur in a vacuum and their effect on the case was weighed in the aggregate by the court. The ignorance of the chief of justice is unlikely considering the repeated nature of trial counsel’s actions and the amount of time they continued. The court opinion makes no mention of any corrective actions taken by the leadership and none are evident based on how the events played out. These facts give the appearance that the environment of the office was at least conducive to the actions of trial counsel.

The ethical and professional atmosphere of the office is the responsibility of supervisory counsel and all leaders are ultimately responsible for ensuring their subordinates conform to the Rules of Professional Conduct.¹²⁵ As Judge

¹²¹ *Id.* at 477.

¹²² *Id.* at 481.

¹²³ *Id.* at 477 n.3.

¹²⁴ *United States v. Stellato*, 74 M.J. 501, 507 (A. Ct. Crim. App. 2014).

¹²⁵ AR 27-26, *supra* note 3, Rule 5.1(b) (requiring all lawyers who directly supervise other lawyers to take reasonable measures to ensure that such subordinates conform their conduct to the rules). Under certain circumstances, supervisory attorneys can be held responsible for ethical violations of their subordinates. *See id.* at Rule 5.1(c) (“A lawyer shall be responsible for another lawyer’s violation of these Rules of Professional

¹¹⁶ MODEL CODE OF PROF’L RESPONSIBILITY Canon 9 (AM. BAR ASS’N 1980).

¹¹⁷ MODEL CODE OF PROF’L RESPONSIBILITY Canon 9-2 (AM BAR ASS’N 1980).

¹¹⁸ *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹¹⁹ AR 27-26, *supra* note 3, Rule 5.1.

¹²⁰ *United States v. Stellato*, 74 M.J. 473, at 482, 489 (C.A.A.F. 2015).

Ohlson accurately stated, “the responsibility to protect a service member’s constitutional right to a fair trial does not rest solely with the lone trial counsel advocating in the courtroom; it extends to the chief of justice and to other supervisory officers as well.”¹²⁶ The responsibility Judge Olson contemplates is a holistic one. Military justice managers must be proactive in this regard. Failure to do so is a failure of obligations to one’s subordinates as a leader, the requirements of the Service Rules, and the military justice system.

IV. Conclusion

Military justice managers are critical to the ethical and professional practice of law in the judge advocate community. They establish, maintain, and regulate the ethical atmosphere within their shops. Striking the right balance between advocacy and professional obligations requires knowledge of the Service Rules and a healthy concept of civility and professionalism. With that balance a military justice manager will function as the moral and ethical compass for their subordinates. Exercise of basic leadership principles allows military justice managers to effectively engage with their subordinate counsel and accomplish this duty.

Applying ethical rules to the practice of law can quickly become confusing, particularly for inexperienced judge advocates. In addition to parsing and simply applying the rules, the competitive nature of advocacy can be difficult for judge advocates to separate from their duties as officers of the court. In these areas, the engaged presence of military justice managers can prevent issues like the ones addressed in *Stellato*.

The judge advocate community needs and deserves this type of leadership. With a healthy understanding of the Service Rules, in particular zealous advocacy and professionalism, military justice managers can guide their subordinates through some of the most difficult issues faced by inexperienced counsel. In doing so, military justice managers can avoid the unsavory consequences of discovery violations and other unprofessional behavior; bettering the military justice system and the counsel involved in its administration.

Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”). Cf. ADP 6-0, *supra* note 35, para. 26. (“Commanders are legally responsible for their decisions and for the actions, accomplishments, and failures of their subordinates.”).

¹²⁶ United States v. Hornback, 73 M.J. 155, 165 (C.A.A.F. 2014).

Processing Reserve Component Members: AWOL From, and Return to, the Regular Army

Major Hans P. Zeller*

Now I know! And knowing is half the battle.¹

I. Introduction

In January 2008, Army reservists First Lieutenant (1LT) Kham and her husband, Staff Sergeant (SSG) Roberts,² mobilized to Hawaii on active duty orders to join a regular Army command. It was the height of the troop surge in Iraq,³ and regular Army commands in Hawaii backfilled their deployed members' positions with reserve component personnel.⁴ As an adjutant general officer, 1LT Kham was in a unique position to understand the military pay and allowances authorized for reserve component Soldiers on active duty.

Over the course of nearly a year, the couple pursued an extravagant lifestyle—they purchased a large home in the mountains, a Porsche 911 sports car, and a pair of motorcycles, among other things. They funded this lifestyle, in part, by claiming reimbursement for two separate rental properties—one for each of them—that they did not live in. By the time a fraud task force caught up to the couple, the estimated loss to the government was valued at over \$140,000. First Lieutenant Kham and SSG Roberts subsequently fled Hawaii through subterfuge⁵ and five years passed before they were discovered in Laos and returned to military control in Hawaii.

Charges were preferred against both reserve component Soldiers, and Lieutenant Kham was the first to face a contested general court-martial. There, an officer panel found

her guilty of larceny, false official statements, conspiracy, and desertion. Near the end of the sentencing phase of the trial, the military judge looked to the trial counsel and said, “In accordance with Article 2d(5) of the Uniform Code of Military Justice (UCMJ), unless the Secretary of the Army approves the orders bringing a reservist back on active duty for UCMJ purposes, no confinement can be adjudged. Did you have something showing that he approved the orders?”⁶ The trial counsel looked at each other, then behind the bar to the senior trial counsel. The defense attorneys seemed similarly unsure of what the judge was asking. In accordance with Article 2d(5)? Secretary of the Army approval? Could confinement really not be adjudged?

Proper processing of reserve component Soldiers who absent themselves from regular Army units can differ greatly from that of their regular Army counterparts, both at the time the absence without leave (AWOL) begins, and later upon return to military control (RMC). Failure to appreciate the differences can both frustrate a command's intent and infringe upon the rights of the reserve component Soldier.

This article will explore AWOL and RMC processing of reserve component Soldiers as it relates to regular Army units and judge advocates, using the story of 1LT Kham and SSG Roberts as an illustrative example. The first portion of the article will focus on the initial AWOL action; from understanding the Army reserve component at large, to understanding the orders involved, to coordinating the action

* Judge Advocate, United States Army. Presently assigned Brigade Judge Advocate, 18th Field Artillery Brigade, Fort Bragg, North Carolina. LL.M., 2016, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D., 2006, University of San Diego School of Law; B.A., 2001, Brigham Young University. Previous assignments include Trial Counsel, Senior Trial Counsel and Chief of Military Justice, 8th Theater Sustainment Command, Fort Shafter, Hawaii, 2013–2015; Detainee Review Board (DRB) Recorder, DRB Legal Advisor, and DRB Officer-in-Charge (OIC), Joint Legal Center, Combined Joint Inter-Agency Task Force 435, Bagram Airfield, Afghanistan, 2012–2013; Brigade Judge Advocate, 6th Recruiting Brigade, United States Army Recruiting Command, Las Vegas, Nevada, 2010–2012; Legal Assistance Attorney, Tax Center OIC, Administrative Law Attorney, and Trial Counsel, 8th Army, U.S. Army Garrison Yongsan, Seoul, Republic of Korea, 2007–2010. Member of the bar of Utah. This primer was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course.

¹ From 1985 to 1987, twenty-eight original G.I. Joe cartoon episodes finished with public service announcements that invariably ended with children stating, “Now I know!” and a G.I. Joe hero responding “And knowing is half the battle.” For an example, see Flint teach a group of children “It's better to tell the truth” at https://www.youtube.com/watch?v=1oMTBQAKi_c (last visited on Mar. 5, 2017).

² These events are loosely based on the author's professional experience as Senior Trial Counsel for the U.S. Army 8th Theater Sustainment Command, Fort Shafter, Hawaii, 2014–2015 [hereinafter Professional Experiences].

³ AMY BELASCO, CONG. RESEARCH SERV., R40682, TROOP LEVELS IN THE AFGHAN AND IRAQ WARS, FY2001–FY2012: COST AND OTHER POTENTIAL ISSUES I (2009). Average monthly “boots on the ground” peaked at 157,800 in Iraq in fiscal year (FY) 2008 and steadily decreased from that point. *Id.* at 9.

⁴ Interview with Kepola Mai'i, military pay supervisor, U.S. Army Reserve 9th Mission Support Command, at Fort Shafter, Hawaii (Mar. 9, 2013).

⁵ First Lieutenant Kham and SSG Roberts came to Hawaii on self-terminating orders for a period of one year in January 2008. In December 2008, the couple was involuntarily extended on active duty and was to be attached to a different regular Army unit with authority to convene general courts-martial. Instead of in-processing at the different unit, the couple took their original self-terminating orders, along with forged terminal leave forms, to a garrison unit established to process the many reserve assignments in Hawaii. The garrison unit, suspecting no foul play, generated the appropriate discharge orders and travel authorizations, and the couple flew to California in early January. When the original regular Army unit learned the couple had not in-processed to their new regular Army unit, they initiated contact by phone and email and ordered the couple to return to Hawaii. Two days later, 1LT Kham and SSG Roberts fled the United States, abandoning their home in Hawaii and their household goods and vehicles in California. Professional Experiences, *supra* note 2.

⁶ *Id.*

with the right reserve component command. The next portion of the article will focus on properly dropping a reserve component Soldier from a regular Army unit's rolls and ensuring the Soldier is added to the regular Army's end-strength, and why that matters for a judge advocate. The final portion of the article will cover what to look for and what to do upon a reserve component Soldier's RMC; from getting the Soldier back to the right regular Army unit, to obtaining Department of the Army (DA)-level approval to restrain or to confine the Soldier.

II. Absence Without Leave

A. Know the Reserve Components

The reserve components of the Army are the U.S. Army Reserve (USAR) and the Army National Guard of the United States (ARNGUS).⁷ The USAR is comprised of the U.S. Army Reserve Command (USARC) located at Fort Bragg, North Carolina,⁸ and twenty-six subordinate operational, support, and training commands throughout the United States, its territories, and the U.S. Army Europe and U.S. Army Pacific component commands.⁹ The ARNGUS is comprised of members and units of fifty-four National Guard organizations—one for each state as well as Guam, the U.S. Virgin Islands, Puerto Rico, and the District of Columbia—each serving under dual control of the federal government, and their respective state or territory/district.¹⁰

Generally speaking, when a reserve component Soldier is attached or assigned to a regular Army unit on active duty,¹¹ he or she does so under one of several statutory authorities found in Title 10 of the U.S. Code (Title 10).¹² For example,

⁷ U.S. DEP'T OF DEF., INSTR. 1215.06, UNIFORM RESERVE, TRAINING, AND RETIREMENT CATEGORIES FOR THE RESERVE COMPONENTS encl. 3, para. 1 (11 Mar. 2014) (C1, 19 May 2015) [hereinafter DoDI 1215.06]. Beyond the United States Army Reserve (USAR) and the Army National Guard of the United States (ARNGUS) distinction, the reserve component is divided into three primary organizations: the Standby Reserve, the Retired Reserve, and the Ready Reserve. The Ready Reserve is further divided into the Individual Ready Reserve, the Inactive National Guard, and the Selected Reserve. Finally, the Selected Reserve is divided into Individual Mobilized Augmentees, Training Program Units, and Active Guard/Reserve members. Interview with MAJ T. Scott Randall, Adjunct Professor, Administrative Law Department, The Judge Advocate General's Legal Center and School (Nov. 11, 2015). For any of those organizations, the main types of authorized reserve component duty are active duty, inactive duty, or full-time National Guard duty. DoDI 1215.06, encl. 3, para. 1. Note that full-time National Guard duty is *not* active duty. *Id.*

⁸ OUR COMMANDS—OPERATIONAL, FUNCTIONAL, SUPPORT AND TRAINING, <http://www.usar.army.mil/Commands.aspx> (last visited Mar. 5, 2017).

⁹ *Id.*

¹⁰ John E. Pike, ARMY NATIONAL GUARD, <http://www.globalsecurity.org/military/agency/army/arng.htm> (last visited Mar. 5, 2017).

¹¹ Generally speaking, active duty is defined as full-time duty in the active military service of the United States. *See* U.S. DEP'T OF ARMY, REG. 135-200, ACTIVE DUTY FOR MISSIONS, PROJECTS, AND TRAINING FOR RESERVE COMPONENT SOLDIERS Glossary, Section II Terms, "Active Duty" (20 June

1LT Kham and SSG Roberts were USAR Soldiers who, upon asking to join the regular Army in Hawaii, were ordered to active duty under Title 10, section 12301(d), authorizing volunteer mobilizations.¹³

Title 10 also provides the authority for regular Army commanders to exercise UCMJ jurisdiction over those reserve component Soldiers on active duty within their ranks.¹⁴ This portion of Title 10—commonly referred to as Article 2 of the UCMJ—indicates not only when UCMJ jurisdiction applies to a reserve component Soldiers on active duty, but also how and when such a Soldier may be recalled to active duty for disciplinary matters.¹⁵ This was the provision of law the military judge cited in 1LT Kham's court-martial that initially left the trial counsel and defense counsel confused.

Article 2 jurisdiction attaches to reserve component Soldiers on active duty either on the day they report for duty or the day travel begins to report for duty.¹⁶ Likewise, Article 2 jurisdiction ends on the day the active duty orders expire,¹⁷ and the reserve component Soldier is released from active duty and transfers or reverts to an inactive duty status.¹⁸ In every case, a reserve component Soldier absents himself or herself from a regular Army unit either by failing to report to active duty or by absenting while serving on active duty.¹⁹

B. Know the Orders

Upon learning of a reserve component Soldier's absence, the regular Army unit judge advocate should request a copy of the orders that brought the Soldier to active duty. It is important for the judge advocate to know the nature and duration of the orders before providing any recommendations

1999) [hereinafter AR 135-200]. As used in Army regulations concerning reserve component orders and active duty, the term applies to all USAR and ARNGUS Soldiers ordered to duty under Title 10, U.S. Code, other than for training. *Id.* *See also* U.S. DEP'T OF ARMY, REG. 135-210, ORDER TO ACTIVE DUTY AS INDIVIDUALS FOR OTHER THAN A PRESIDENTIAL SELECTED RESERVE CALL-UP, PARTIAL OR FULL MOBILIZATION Glossary, Section II Terms, "Active Duty" (17 Sept. 1999).

¹² 10 U.S.C. §12301 (2012).

¹³ §12301(d).

¹⁴ 10 U.S.C.A. § 802 (2012 & Supp. III 2015), amended by National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, 130 Stat. 2000, 2894.

¹⁵ § 802(d).

¹⁶ Major T. Scott Randall, *Saturday Night Jurisdiction Over Reserve Soldiers*, ARMY LAW., June 2013, at 31, 32.

¹⁷ *Id.* at 33.

¹⁸ AR 135-210, *supra* note 11, Glossary, Section II Terms, "Release from Active Duty." Unit members of the ARNGUS and the USAR revert to their respective components for any unexpired enlistment and/or statutory obligations. *Id.*

¹⁹ U.S. DEP'T OF ARMY, REG. 630-10, ABSENCE WITHOUT LEAVE, DESERTION, AND ADMINISTRATION OF PERSONNEL INVOLVED IN CIVILIAN COURT PROCEEDINGS para. 5-1 (13 Jan. 2006) [hereinafter AR 630-10].

to his or her command. Beyond knowing the typical information concerning name, rank, and home of record, the judge advocate should answer the questions addressed below.

1. *Already Added to the Active Army's End-Strength?*

Adding or dropping a Soldier from the "active Army"²⁰ end-strength refers to an accounting procedure that measures the operating strength of the Army.²¹ While this accounting procedure should not be confused with the Soldier's active duty status as authorized by Title 10, it is relevant because the Army's AWOL regulation (AR 630-10) requires reserve component Soldiers previously added to the active Army's end-strength to be processed as regular Army Soldiers.²² A judge advocate does not want to advise a command on the extra steps required for reserve component Soldiers described in this paper, only to later learn the steps were not necessary.

How does one determine this accounting classification? Some active duty orders will explicitly state whether or not the reserve component Soldier is to be added to the active Army. For example, 1LT Kham and SSG Robertson's orders stated they were *not* to be added to the active Army's end-strength while assigned to their regular Army unit in Hawaii. If the reserve component Soldier's orders are silent on the subject, the judge advocate should not assume the Soldier was not added to the Army's end-strength, and should still confirm the classification with the unit personnel officer (S1).²³

2. *How Much Time Remains on the Orders?*

A judge advocate must also take care to determine the time remaining on the active duty orders. If more than thirty days remain, the regular Army unit commander must immediately appoint an informal investigation into the AWOL.²⁴ The purpose of the investigation is to determine whether or not the absence is authorized. As with most investigations, the judge advocate plays a role in facilitating and reviewing the investigation.²⁵ If the informal investigation is substantiated, and no legitimate reasons for the absence exist, the regular Army unit commander must report the AWOL to his or her S1, the local Provost Marshal's Office (PMO), and the command's deserter control officer²⁶ within forty-eight hours.²⁷

If fewer than thirty days remain on the reserve component Soldier's orders, the same investigative and notification requirements apply. However, the regular Army unit must also contact the agency that originally issued the active duty orders and request an amendment extending the reservist on active duty. The extension can be for thirty more days, or the length of time to complete the reserve component Soldier's active duty mission, whichever is greater.²⁸

Obtaining the amended orders is more than just a clerical matter. For a judge advocate, the orders help ensure the absent reserve component Soldier remains in a Title 10 status on active duty throughout the period of AWOL processing—in particular for reserve component Soldiers with "self-terminating orders,"²⁹ the amended orders rebut a presumption that the Soldier automatically reverted or transferred to an inactive duty status.³⁰ Requesting such orders may also be the first time the unit interacts with the

²⁰ AR 135-210, *supra* note 11, Glossary, Section II Terms, "Active Army."

a. The active Army consists of the following: (1) Regular Army soldiers on active duty; (2) Army National Guard of the United States and Army Reserve soldiers on active duty (except as excluded below); (3) Army National Guard soldiers in the service of the United States pursuant to a call; and (4) all persons appointed, enlisted, or inducted into the Army without component.

b. Excluded are soldiers serving on the following: (1) active duty for training (ADT); (2) Active Guard Reserve (AGR) status; (3) active duty for special work (ADSW); temporary tours of active duty (TTADs) for 180 days or less; and (5) active duty pursuant to the call of the President (10 USC 12304).

Id.

²¹ AR 630-10, *supra* note 19, Glossary, Section II Terms, "Dropped from strength."

²² *Id.* para. 5-6b.

²³ There are instances when a reserve component Soldier may be added to the active Army's end-strength even if the active duty orders are silent on the matter. For example, a temporary tour of active duty may require the regular Army unit's personnel officer (S1) to classify the reserve component Soldier as part of the Active Army end-strength. AR 135-200, *supra* note 11, paras. 1-6, 1-71.

²⁴ AR 630-10, *supra* note 19, para. 5-6c(1).

²⁵ U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARD OF OFFICERS, para. 1-5 (1 Apr. 2016).

²⁶ A deserter control officer is an officer appointed by the command's special court-martial convening authority (SPCMCA) and typically is a member of the command S1. The officer's roles include coordination with law enforcement and the S1 at the time of AWOL, and accurate and complete preparation of the deserter dropped from rolls (DFR) packet. AR 630-10, *supra* note 19, para. 1-4i.

²⁷ *Id.* para. 1-4j.

²⁸ *Id.* para. 5-6c(5). Note that if the reserve component Soldier returns within the additional 30-day period and is qualified for retention in the Army, he remains on duty until completion of the mission or training agreement. *Id.*

²⁹ "Self-terminating orders are those which, by their own terms, purport to terminate on the specified effective date and return the Soldier to the place where he or she entered on duty." AR 135-200, *supra* note 11, para. 7-3. When such orders expire, a reserve component Soldier is automatically released from active duty without further action. *Id.* Glossary, Section II Terms, "Self terminating orders." A reserve component Soldier's return to inactive duty status will not prevent disciplinary action by the regular Army command upon RMC; however, it may require a recall to active duty and potential approval at the Department of the Army (DA) level. *See infra* section IV, subsections B. and C. (describing involuntary recalls to active duty and secretarial approval for restraint and confinement).

³⁰ See AR 135-200, *supra* note 11, Glossary, Section II Terms, "Self terminating orders."

Soldier's reserve component command, the importance of which will be explained below.

C. Coordination with a Reserve Component Command

1. The Notification Requirement

Army regulation 630-10 requires notice of the AWOL be given to the Soldier's reserve component commander after completion of the regular Army unit's informal investigation.³¹ Identifying the right command can be difficult. The reserve component Soldier's enlisted record brief or officer record brief may note the Soldier's assignment history prior to his or her attachment to the regular Army unit, which may provide a starting point to identify the proper reserve component command. The judge advocate may also contact the local reserve component office of the staff judge advocate (OSJA) for assistance, or, if none is available, the OSJA, USARC,³² in order to identify the correct points of contact. The notification must be provided using a DA Form 4187.³³ Section II of DA Form 4187 should show a status change from "present for duty" to "AWOL,"³⁴ with the effective date being the first date of the AWOL status.³⁵

Along with the notification, the regular Army unit commander must also request that the reserve component commander order the AWOL reserve component Soldier to active duty in the active Army.³⁶ This request may seem odd, considering the reserve component Soldier is already on active duty and a request to further extend the Soldier on active duty may have just been made to the reserve command if they issued the original active duty orders.³⁷ However, as will be shown later, these new orders are used to add the reserve component Soldier to the active Army's end-strength.³⁸ While this notification and request for orders is made at the outset of the AWOL, the regular Army unit commander must in most cases then wait thirty consecutive

days from the initial date of the absence to continue AWOL processing,³⁹ assuming the reserve component commander decides to allow the process to continue.

2. The Decision to Continue AWOL Processing

It may surprise a regular Army commander, but the reserve component commander may unilaterally end AWOL processing after notification of the AWOL from the regular Army unit.⁴⁰ Army regulation requires the reserve component commander to decide if the absent Soldier's original active duty orders should be revoked then and there, or if AWOL processing should continue.⁴¹ Revocation of the original active duty orders may occur when the reserve component commander determines it is not worth the time or effort to retain the Soldier through the AWOL process, or on the other hand, if he or she believes continued processing is not justified. When the regular Army command desires processing to continue, the judge advocate should coordinate with his or her reserve component counterpart to explain the circumstances. For example, if the reserve component Soldier was under investigation or pending trial by court-martial at the time of the absence, then there is a strong argument to continue AWOL processing. Assuming the reserve component commander does decide AWOL processing should continue, he or she then holds the regular Army commander's request for new orders to active duty until the thirty-first consecutive day of the AWOL.⁴²

The initial notification and coordination required with a reserve component command described above is where regular Army units can clearly fail to properly process reserve component Soldiers who are AWOL from their ranks. In the case of 1LT Kham and SSG Robertson, the regular Army unit never contacted the couple's reserve component command—a failure that would become a point of contention when arguing the couple's duty status five years later.⁴³ Knowing

³¹ AR 630-10, *supra* note 19, para. 5-6c(1)a.

³² The United States Army Reserve Command Office of the Staff Judge Advocate can be contacted at 4710 Knox Street, Fort Bragg, NC 28310, (910) 570-8128, per the 2015-2016 Judge Advocate General's Corps Personnel Directory, [https://www.jagcnet2.army.mil/Sites/ppto.nsf/0/A58502BFD037B3C885257D420055FDAC/\\$FILE/JAGC%20Directory.pdf](https://www.jagcnet2.army.mil/Sites/ppto.nsf/0/A58502BFD037B3C885257D420055FDAC/$FILE/JAGC%20Directory.pdf) (last visited May 18, 2016).

³³ AR 630-10, *supra* note 19, para. 5-6c(1)(a).

³⁴ *Id.* para. 5-6c(1)(a).

³⁵ See *infra* Appendix A, Department of the Army (DA) Form 4187 "Personnel Action."

³⁶ AR 630-10, *supra* note 19, para. 5-6c(1)(b). If the reserve component soldier's duty station is not on a regular Army installation or with an active Army organization, the request should be routed through the nearest active Army installation command and should (1) include assignment instructions; (2) state the effective date of the proposed DFR; and (3) list the commander, Fort Knox Personnel Control Facility in the distribution section. *Id.*

³⁷ *Supra* note 27.

³⁸ See *infra* section III (discussing in detail what the active Army end-strength is, and how and why a reserve component Soldier is added to active Army's end strength as a part of completing AWOL processing).

³⁹ Exceptions to the 30-day waiting period for continued processing of AWOL include those cases where the unit commander *reasonably believes* the Soldier has shown or expressed an intent to not return to the unit. Examples can include seeking political asylum or joining the armed forces of a foreign country, failure to return to a unit following RMC at a different location, and escape from confinement. However, an expressed intention not to return to a *particular unit* does not qualify as an exception. See *infra* note 58.

⁴⁰ AR 630-10, *supra* note 19, para. 5-6c(3).

⁴¹ *Id.*

⁴² *Id.* para. 5-6c(4). If the reserve component Soldier returns within 30 days and otherwise remains eligible for retention in the Army, he or she remains attached or assigned to the regular Army unit until the completion of the mission or training. This does not prevent the regular Army unit commander from disciplining the reserve component Soldier under the Uniform Code of Military Justice (UCMJ). *Id.* para. 5-8.

⁴³ *Infra* note 109.

such coordination requirements exist, and knowing a reserve component commander may unilaterally end the AWOL process from the very beginning, helps a judge advocate keep their command on track as they move next to drop the reserve component Soldier from their rolls, as described below.

III. Dropping From Rolls

Dropping from rolls (DFR) is an administrative action that removes an AWOL Soldier from the strength accountability of a unit.⁴⁴ On the thirty-first consecutive day of a reserve component Soldier's AWOL, he or she should be added to the active Army's end-strength, and then DFR should occur.⁴⁵ Once again, the process is more than just a clerical exercise. For a judge advocate, the steps taken at this point freeze the reserve component Soldier in his or her active duty status, toll the five-year statute of limitations on preferral of any charges stemming from the Soldier's period of active duty,⁴⁶ and result in a robust record used for legal and administrative processing following the Soldier's RMC. As will be shown below, while there are several steps in the DFR process, AR 630-10 requires a complete DFR packet to be forwarded to the U.S. Army's Deserter Information Point (USADIP)⁴⁷ in a mere forty-eight hours.⁴⁸ The more a judge advocate knows about the process, the more he or she can help the command and staff stay ahead of and adhere to the time suspense.

A. Accession into the Active Army's End-Strength

Following up on the request from the regular Army commander made at the outset of the AWOL, the reserve

component commander (with the approval of the appropriate state adjutant general for ARNGUS Soldiers) publishes the new active duty orders⁴⁹ attaching the AWOL Soldier to a regular Army unit, effective 0001 hours on the date of the DFR.⁵⁰ The regular Army unit judge advocate should be aware of the proper language and format for those orders, as well as how the accession process into the Army's end-strength works.

1. Proper Language and Order Format

Given the typical 30-day waiting period to begin the DFR process, a judge advocate often has time to request review of the new active duty orders generated by the reserve component command. The orders should include the following language: In the action lead line—"By direction of the Secretary of the Army, you are relieved from attachment and assigned to (the regular Army unit)"; in the effective date lead line—add the date that is 0001 hours of the thirty-first consecutive day of AWOL; in the period lead line—"Until relieved from active duty by competent authority"; in the purpose lead line—"For processing under AR 630-10."⁵¹

The judge advocate should also confirm "Format 440" (orders for attachment or assignment)⁵² appears on the orders, as opposed to "Format 460" (orders for involuntary recall to active duty for UCMJ action, implying the reserve component Soldier was in an inactive duty status at the time the orders were generated).⁵³ Use of the Format 440 orders is further evidence the judge advocate may rely upon to show the reserve component Soldier remained in an active duty status throughout the period of AWOL processing right up to the

⁴⁴ AR 630-10, *supra* note 19, Glossary Section II, Terms "Dropped from the rolls of a unit."

⁴⁵ Per AR 630-10, *supra* note 19, para. 5-7b, there are exceptions to this general rule.

ARNGUS and USAR Soldiers who depart AWOL after reporting to their AD or ADT duty station are not accessed into the Active Army for DFR action when the conditions below exist. In these cases, the Soldiers may be separated while in an AWOL status from their AD or ADT duty station when one or more of the following conditions exist: (1) The Soldiers have been recommended for entry level status separation per AR 635-200, chapter 11. (2) The Soldiers departed AWOL before completion of the separation action. (3) Disciplinary action against the Soldiers is not contemplated.

Id.

⁴⁶ The UCMJ typically places a five-year limit on preferring most offenses; however, it excludes all periods in which an accused is AWOL or is otherwise in a territory from which the United States cannot exercise control over the accused. 10 U.S.C. § 843 (2012 & Supp. III 2015), amended by National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, 130 Stat. 2000, 2909.

⁴⁷ The United States Army Deserter Information Point (USADIP), located at Fort Knox, Kentucky, provides broad oversight of regular Army and reserve component desertions, to include: verifying and documenting

reports of desertion and RMC; cross-checking Army databases to prevent false apprehension; and coordination with unit desertion control officers, criminal investigators, Provost Marshals, civilian law enforcement authorities, and Department of State. The USADIP can be contacted at (502) 626-3710 or by email at knox.usadip.ncic@conus.army.mil. U.S. DEP'T OF ARMY, REG. 190-9, ABSENTEE DESERTER APPREHENSION PROGRAM AND SURRENDER OF MILITARY PERSONNEL TO CIVILIAN LAW ENFORCEMENT AGENCIES, para. 1-4e(2) (28 Sept. 2015).

⁴⁸ AR 630-10, *supra* note 19, para. 2-2j(1).

⁴⁹ See U.S. DEP'T OF ARMY, REG. 600-8-105, MILITARY ORDERS app. A (28 Oct. 1994) [hereinafter AR 600-8-105].

⁵⁰ AR 630-10, *supra* note 19, para. 5-7a(2).

⁵¹ *Id.* para. 5-7a(4).

⁵² AR 600-8-105, *supra* note 50, fig. 3-10 (depicting Format 440 orders used for USAR and ARNGUS Soldiers who are attached or released from attachment to regular Army units). See also *infra* Appendix D, Format 440 "Orders for Assignment or Attachment."

⁵³ *Id.* fig. 3-11 (depicting Format 460 order used for involuntary active duty USAR and ARNGUS Soldiers for processing under the UCMJ). See also *infra* Appendix F, Format 460 "Orders for Involuntary Recall to Active Duty."

moment he or she was added to the active Army's end-strength and DFR.

2. The Accession Process

Once the new active duty orders are published, the reserve component commander should notify the regular Army unit commander of the new active duty order's number and date.⁵⁴ Army regulation 630-10 states this notification is the authority for both the accession into the active Army's end-strength and the DFR.⁵⁵ Using that authority, the regular Army unit commander must then request that his or her unit's S1 classify the reserve component Soldier as added to the active Army's end-strength, effective 0001 hours on the date of the DFR.⁵⁶ At that time, the reserve component Soldier is classified as a deserter,⁵⁷ or, if appropriate, a defector.⁵⁸ What follows next is a paperwork drill required to memorialize and notify parties of the action just taken, and one in which the judge advocate plays a very active role.

B. Forms Ad Nauseam

Once the reserve component Soldier is added to the active Army's end-strength and DFR, a parade of forms and related notifications must be completed by the regular Army unit, all within forty-eight hours. First, the regular Army unit commander must report the reserve component Soldier as DFR on a DA Form 4187.⁵⁹ This may be done simultaneously with the reservist's accession into the active Army.⁶⁰ The regular Army unit commander should also report the DFR to his or her unit's military pay office using the same form in order to stop all pay and allowances.⁶¹

Next is the Department of Defense (DD) Form 553, "Deserter/Absentee Wanted by the Armed Forces."⁶² The

suspected reason(s) for the desertion/defection and information on any investigations, Article 15's, or UCMJ action pending at that time are recorded on the form,⁶³ and the judge advocate provides input and reviews the final product. The regular Army unit must then send the DD Form 553 and any attachments to their supporting PMO.⁶⁴

The regular Army unit commander must also complete a DD Form 458, "Charge Sheet" and prefer any applicable criminal charges, including at a minimum Article 85, UCMJ, for desertion.⁶⁵ Once charges are preferred, the charge sheet must be forwarded to the command's special court-martial convening authority, who enters the hour and date of receipt of charges on page two of the form.⁶⁶

C. The Deserter DFR Packet

The regular Army unit should compile the multiple DA Form 4187's noting the AWOL and later the DFR, the DD Form 553 (deserter/absentee wanted form) and its enclosures, the DD Form 458, (charge sheet), the new active duty orders accessing the reserve component Soldier into the active Army, and any related investigations and other supporting documentation, all in order to create a deserter DFR packet.⁶⁷ The judge advocate should obtain a copy of the complete packet and preserve it in his or her files for future use upon the reserve component Soldier's RMC. The original packet should be routed through the regular Army unit's S1 to the Army's Personnel Control Center at Fort Knox, Kentucky.⁶⁸ Finally, the regular Army unit commander must also send a certified copy of the same packet to the chief of USADIP within forty-eight hours of the DFR.⁶⁹

A regular Army unit that fails to understand the DFR process for a reserve component Soldier would likely process

⁵⁴ AR 630-10, *supra* note 19, para. 5-7a(3).

⁵⁵ *Id.* para. 5-7a(3).

⁵⁶ *Id.* para. 5-7a(6).

⁵⁷ A deserter is a Soldier who is DFR from his or her unit when, among other things, he or she goes from or remains absent from their unit, organization, or place of duty with the intent to remain away permanently. This is also a violation of Article 85 of the UCMJ. *Id.* Glossary, Section II Terms, "Deserter" A Soldier is presumed to be a deserter following thirty consecutive days of absence, but can be classified a deserter before thirty days if the command has a reasonable belief the Soldier will not return. *Id.*

⁵⁸ If the regular Army command reasonably determines the deserter fled to a foreign country, be it friendly or hostile, and there either sought political asylum, joined the country's armed forces, or otherwise resides in that country, he is also classified a defector. *Id.* para. 3-4c. In such cases, additional obligations are required of the command, to include notifying the unit's supporting counter-intelligence unit and the Department of the Army Operations Center. *Id.* This would have been the proper classification for 1LT Kham and SSG Robertson if done correctly by the unit at the time of their DFRs.

⁵⁹ See *infra* Appendix A, DA Form 4187 "Personnel Action."

⁶⁰ AR 630-10, *supra* note 19, para. 5-7a(6).

⁶¹ *Id.* para. 3-1a(1).

⁶² See *infra* Appendix B, Department of Defense (DD) Form 553 "Deserter/Absentee Wanted by the Armed Forces."

⁶³ AR 630-10, *supra* note 19, para. 3-1a(2).

⁶⁴ *Id.* para. 3-1a(3).

⁶⁵ 10 U.S.C. § 885 (2012).

⁶⁶ AR 630-10, *supra* note 19, para. 3-1a(4).

⁶⁷ *Id.* para. 3-1a(5).

⁶⁸ Send to the Commander, Army Personnel Control Center, ATTN: ATZK-PMF-DIP, Fort Knox, KY 40121. *Id.* para. 3-1a(5).

⁶⁹ *Id.* The USADIP is located at the same address as the Army Personnel Control Center. *Id.* Note that AR 630-10 also requires a copy of the deserter DFR packet be sent to the commander, U.S. Army Enlisted Records and Evaluation Center (USAEREC). *Id.* para. 5-7a(6)(c). However, USAEREC no longer exists as an organization and its responsibilities now reside with the Adjutant General Directorate, U.S. Army Human Resources Command, Fort Knox, Kentucky. Email correspondence with Mr. James Ricks III, G3/7 Policy and Programs Branch Chief, U.S. Army Human Resources Command (Feb. 10, 2016) (on file with author).

him or her in the same manner as they would a regular Army Soldier—the DFR would still happen, but the reserve component Soldier would not be properly accessed into the active Army, and not by authority obtained from a reserve component command. Such was the case involving 1LT Kham and SSG Robertson, and when their active duty orders terminated in 2009, creating avoidable questions regarding their current duty status. Did they yet remain on active duty or revert to inactive duty at some point? Should a recall to active duty have occurred, and if so, by whom? The questions would ultimately require litigation five years later when the couple was returned to military control in Hawaii.⁷⁰

IV. Return to Military Control

It could be months or even years, but there may come a time when the reserve component Soldier is returned to military control. The return may be voluntary or by apprehension.⁷¹ It might be to a different unit than the regular Army unit he or she originally absented from, requiring coordination across installations. Decisions may also need to be made regarding whether to retain or recall to active duty for adverse administrative action, non-judicial punishment, or UCMJ action. Finally, if any restraint or confinement is anticipated, approval might be required at the DA level.⁷² As with AWOL processing, knowing what is required at the time of RMC can make all the difference in getting the mission accomplished and protecting the deserter's rights.

A. Returning to the Regular Army Unit

As a general rule, a deserter is returned to the regular Army unit from which he or she was originally AWOL.⁷³ When the Soldier returns to a different installation, he or she may be temporarily attached to a unit at the host installation

in order to conduct in-processing back into the regular Army.⁷⁴ A “return from DFR to duty” transaction⁷⁵ is completed by the hosting unit's S1, in which new Format 440 orders (orders for attachment or assignment) are generated.⁷⁶ The attachment orders are sent with a DA Form 4187 noting the reserve component Soldier's return to duty status to the chief, USADIP, who in turn forwards a copy to the desertion control officer for the regular Army unit from which the reserve component Soldier was originally absent.⁷⁷

The host unit is also charged with classifying the reserve component Soldier's absence to determine if it was unauthorized and if the Soldier should be charged for time lost.⁷⁸ To do this, the hosting unit's commander informally investigates the absence,⁷⁹ and it is here that a robust deserter DFR packet saved by one judge advocate can first be of use to another. Upon completion of the informal investigation, the absence is classified by the host unit commander as authorized or unauthorized.⁸⁰ After initial in-processing and the informal investigation are complete, reserve component Soldiers not requiring special assistance or escort are provided a DD Form 460, “Provisional Pass,”⁸¹ from the hosting installation's PMO and are ordered to return to the regular Army unit he or she absented from.⁸² Alternatively, reserve component Soldiers require escort if they are pending court-martial on serious charges other than the current absence; there is a pending investigation of serious charges at the time of DFR; they have escaped confinement; or if they otherwise present a flight risk.⁸³

If the reserve component Soldier returns directly to the regular Army unit he or she absented from, the same in-processing and informal investigation requirements apply. The RMC process is complete when a DD Form 616 “Report of Return of Absentee”⁸⁴ is prepared by the command's PMO and sent to the chief, USADIP.⁸⁵ Upon completion of the

⁷⁰ Responding to the military judge's question concerning Article 2(d)(5), trial counsel argued that the provision was not relevant because the couple never left active duty status. The defense team countered with the argument that the discharge paperwork created by the command did end their active duty status, even if such paperwork was later revoked by the same command. The defense team further argued that the local orders created at the time of RMC were not in proper format and excluded the DA-level approval required to order both pre-trial restraint and any confinement following conviction in a court-martial. Professional Experiences, *supra* note 2.

⁷¹ Absentees or deserters are RMC when they surrender to the military, are delivered to military, are detained by civilian law enforcement authorities with an outstanding military detainer against them, are receiving treatment in civilian medical facilities and can't be immediately returned to the military, or have entered another U.S. Armed Service.” AR 630-10, *supra* note 18, para. 4-1a.

⁷² *Infra* note 97.

⁷³ AR 630-10, *supra* note 19, para. 4-2a. Exceptions to this requirement include cases where the regular Army unit was inactivated or reduced to zero strength. In such cases, a request for assignment can be made to U.S. Army Human Resources Command at Fort Knox, Kentucky. *Id.*

⁷⁴ *Id.* para. 4-6c.

⁷⁵ *Id.*

⁷⁶ *See supra* note 50.

⁷⁷ AR 630-10, *supra* note 19, para. 4-4a.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See id.* Note that paragraphs 4-4b and 4-4c provide further classification guidance.

⁸¹ *Supra* note 70. *See also infra* Appendix E, DD Form 460 “Provisional Pass.”

⁸² *Id.*

⁸³ *Id.* para. 4-6c. Note that the original regular Army unit, not the hosting unit, will be responsible for providing the escorts.

⁸⁴ *See infra* Appendix C, DD Form 616 “Report of Return of Absentee.”

⁸⁵ AR 630-10, *supra* note 19, para. 4-7. AR 630-10 also states a DA Form 4187 noting the reserve component Soldier's return to active duty should be sent to the commander, USAEREC, at this time. *Id.* However, USAEREC no longer exists as an organization and its responsibilities reside with the

administrative steps described above, decisions must still be made by the regular Army unit commander regarding what disciplinary action, if any, should be taken.⁸⁶ A decision to pursue disciplinary action in such cases often requires an involuntary recall action, described below, and judge advocates must be ready to advise what that entails.

B. Involuntary Recall Actions

Completion of the RMC process may then lead to the regular Army command's decision to pursue disciplinary action. Army Regulation 630-10 instructs that the command should consider the full range of disposition options and factors detailed in Rule 306 of the Rules for Courts-Martial (RCM).⁸⁷ One such factor is the existence of jurisdiction over the accused and the offense,⁸⁸ and judge advocates must carefully review whatever documentation exists from the time of the AWOL and DFR to determine the nature and extent of the jurisdiction available.

If the regular Army unit followed the correct steps at the time of the AWOL and DFR, the reserve component Soldier was frozen in his or her active duty status when accessed into the active Army's end-strength, and the regular Army command can still exercise jurisdiction over the reserve component Soldier. At that point, the command may take steps to extend the reserve component Soldier on active duty for disciplinary purposes. If steps were missed, however, it is very possible the reserve component Soldier reverted to an inactive duty status at some point before his or her RMC. In such cases, an involuntary recall action is required.

Involuntary recall actions generally refer to bringing an inactive or retired Soldier back to active duty for disciplinary purposes. Article 2(d) of the UCMJ empowers an active duty general court-martial convening authority (GCMCA) to order USAR and ARNGUS Soldiers to active duty.⁸⁹ The involuntary recall may be made for Article 32 preliminary

hearings, nonjudicial punishment, or trial by courts-martial,⁹⁰ but, as a practical matter, most recall actions will only involve serious offenses warranting trial by court-martial.⁹¹ The process for recalling a reserve component Soldier is outlined in Army Regulation 27-10, paragraph 20-3.⁹² As will be described in further detail below, the process must be elevated to the DA level when restraint or confinement is possible following the involuntary recall to active duty.⁹³

What judge advocates cannot do is assume that the Format 440 orders created at the time of RMC are sufficient to permit the exercise all of the UCMJ options normally available to a commander. For example, it was determined 1LT Kham and SSG Robertson's larceny and subsequent five-year defection to Laos warranted trial by general court-martial. However, the judge advocates did not account for potential gaps in the couple's active duty status prior to their RMC, and relied only upon the Format 440 orders generated by their local garrison command in Hawaii when considering their command's exercise of UCMJ authority. In 1LT Kham's trial, the defense argued she had reverted to an inactive duty status while absent and the government had failed to properly bring her back to active duty. If there is any doubt as to the reserve component Soldier's active duty status during the period of the desertion, judge advocates should ensure a new set of orders using Format 460 (orders for involuntary recall to active duty for UCMJ)⁹⁴ are generated through the regular Army unit's GCMCA,⁹⁵ regardless of any Format 440 orders generated for administrative purposes at the time of RMC.

C. SECARMY Approval for Restraint and Confinement

A reserve component Soldier's involuntarily recall to active duty may entail restrictions on liberty or pretrial confinement, or more likely, is done with a view toward confinement following a court-martial. In any such case, Article 2(d) requires a service secretary or his or her designee

Adjutant General Directorate, U.S. Army Human Resources Command. See *supra* note 68.

⁸⁶ AR 630-10, *supra* note 19, para. 4-4a.

⁸⁷ *Id.* para. 4-6b.

⁸⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(b) discussion (C) (2016).

⁸⁹ 10 U.S.C. §802 (d) (2012 & Supp. III 2015).

⁹⁰ *Id.* See also DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 20-3 (11 May 2016) [hereinafter AR 27-10].

⁹¹ Telephone interview with LTC Robert M. Leone, Chief of Operations Branch, Criminal Law Division, Office of The Judge Advocate General (Dec. 11, 2015).

⁹² AR 27-10, *supra* note 91, para. 20-3.

⁹³ See *infra* note 97.

⁹⁴ See *supra* note 51.

⁹⁵ AR 135-200, *supra* note 11, para. 7-9a. The Format 460 order must cite 802(d), Title 10, as the authority. *Id.* para. 7-9b. The request for orders to the general court-martial convening authority (GCMCA) should also include the following:

- (1) Complete identity of the accused including grade, full name, social security number, current military status of the accused to include component to which assigned, unit to which assigned and its location, and home address of the accused at the time of the request;
- (2) Detailed summary of the contemplated charges and specifications or a copy of a preferred charge sheet;
- (3) Prior convictions and nonjudicial punishment if known;
- (4) Summary of the evidence of the case and a copy of the report of investigation, if available;
- (5) Analysis of the evidence demonstrating the need for and likelihood of successful prosecution at trial by courts-martial or the need for imposition of nonjudicial punishment through involuntary order to [active duty]; and
- (6) Indication of where the accused should be ordered to [active duty] and why the order is advisable.

AR 27-10, *supra* note 91, para. 20-3h.

to approve the orders resulting in the involuntary recall.⁹⁶ The designated approval authority for the Army is the Assistant Secretary of the Army for Manpower and Reserve Affairs (ASA, M&RA).⁹⁷

Coming back to 1LT Kham's sentencing, it was at this point the multiple missteps by the Army units involved finally came to a head. There were questions regarding the her duty status based upon a lack of proper processing at the time of her initial AWOL processing, compounded by a reliance upon local Format 440 orders instead of Format 460 orders at the time of her RMC, exacerbated by a potential failure to obtain secretarial approval to confine her following the conviction. Making matters worse, she had been deemed a flight risk upon RMC and placed in pretrial confinement for months prior to her trial—confinement that was impermissible if approval from the ASA, M&RA was in fact required.

If required then, how does a judge advocate go about obtaining secretarial approval? Again, AR 27-10, Chapter 20-3 provides the basic written guidance and authorities.⁹⁸ However, it is the Criminal Law Division of the Office of The Judge Advocate (OTJAG) that will review and facilitate the request, and a judge advocate should therefore coordinate with that office as early in the process as possible.

To begin, the judge advocate should generate a staff judge advocate (SJA) advice memo recommending the appropriate active GCMCA⁹⁹ request secretarial approval of the Format 460 orders used to recall the reserve component Soldier to active duty for UCMJ action. The memo should include the Soldier's background information, a brief statement of the facts warranting the involuntary recall, and why the seriousness of the alleged offenses warrant restriction on liberty, pretrial confinement, and/or confinement following a conviction at a court-martial.¹⁰⁰ The SJA should then present the recommendation memo to the GCMCA with

two memos for the general officer's signature—one addressed to the ASA, M&RA requesting the approval,¹⁰¹ and one addressed to the reserve component Soldier providing notice of the intent to involuntary recall him for disciplinary purposes.¹⁰²

Once the memos are generated and signed at the GCMCA level, the judge advocate should forward the following to the criminal law division, OTJAG, for processing at the DA level: (1) The SJA advice memo for the GCMCA requesting secretarial approval; (2) the GCMCA memo to the ASA, M&RA requesting the same; (3) the GCMCA memo to the reserve component Soldier providing notice of the involuntary recall order; (4) the reserve component Soldier's enlisted record brief or officer record brief; (5) the draft DD Form 458 (charge sheet); and (6) evidence sufficient to justify the request.¹⁰³

The judge advocate should plan for a week or two in order to process the request at his or her GCMCA's level. Processing at the DA level then takes another two to eight weeks while the request is vetted through several attorneys on its way to the ASA, M&RA.¹⁰⁴ Upon final approval, the criminal law division, OTJAG, forwards the ASA, M&RA approval memo¹⁰⁵ to the GCMCA and his or her servicing OSJA.¹⁰⁶ As any restrictions on the recalled reserve component Soldier's liberty prior to secretarial approval would be unlawful if not approved, the judge advocate must anticipate those timelines before providing guidance to his or her commander on such matters.

What about those instances where a reserve component Soldier unexpectedly returns and restrictions on liberty are immediately required? For example, when a reserve component Soldier's desertion is unexpectedly terminated by apprehension and he or she remains a flight risk? The judge advocate will not have the several weeks needed to process

⁹⁶ Article 2(d) states in relevant part:

"A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not (A) be sentenced to confinement; or (B) be required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive-duty training or active duty (other than active duty ordered under paragraph (1)).

10 U.S.C. § 802(d)(5). See also AR 27-10, *supra* note 91, para. 20-3b.

⁹⁷ Telephone interview with LTC Robert M. Leone, Chief of Operations Branch, Criminal Law Division, Office of the Judge Advocate General (Dec. 11, 2015) [hereinafter Leone Interview]. See also AR 27-10, *supra* note 91, para. 5-39b.

⁹⁸ *Id.* para. 20-3b, c.

⁹⁹ Ordinarily, the appropriate active Army GCMCA authorized to involuntarily order a reserve component Soldier to active duty is either the area jurisdiction GCMCA or the GCMCA where the reservist performed duty when the alleged offenses occurred. AR 27-10, *supra* note 91, para. 20-3e(1), (2).

¹⁰⁰ See *infra* Appendix G, Sample SJA Advice Memo to GCMCA.

¹⁰¹ See *infra* Appendix H, Sample GCMCA Memo to ASA, M&RA.

¹⁰² See *infra* Appendix I, Sample GCMCA Notification Memo to Reserve Soldier.

¹⁰³ Leone Interview, *supra* note 98.

¹⁰⁴ Once received by the Office of The Judge Advocate General (OTJAG), the request packet is first reviewed by the Chief of Operations Branch, Criminal Justice Division, and then the Chief, Military Justice Division. The request packet is then forwarded to the Assistant Judge Advocate General for Military Law and Operations, who reviews the request packet and provides a legal opinion on behalf of OTJAG addressed to the ASA M&RA. The request packet and legal opinion is forwarded to the Army Office of General Counsel, who also review the request prior to it being placed in Army staffing. Army staffing in turn routes the request to the office of the ASA M&RA, where final approval or disapproval of the request is made by the ASA M&RA. Once final approval is given or denied, the request packet is returned to the Operations Branch, Criminal Justice Division, OTJAG, and forwarded to the GCMCA and servicing OSJA. *Id.*

¹⁰⁵ See *infra* Appendix J, Sample ASA, M&RA Memo Approving GCMCA Request.

¹⁰⁶ Leone Interview, *supra* note 98.

the request for secretarial approval before a decision is made by the command. In such cases, the judge advocate should immediately seek guidance from the criminal justice division, OTJAG, regarding the likelihood of eventual approval and if appropriate, request expedited processing.¹⁰⁷

VI. Conclusion

There were several missteps in the case of ILT Kham and SSG Robertson's AWOL and RMC processing, yet all of them were avoidable if the judge advocates involved only knew what to look for and the proper steps to take when advising their commands. There are several key points to remember throughout the processes involved.

At the time of the AWOL: Unless the reserve component Soldier was already added to the active Army's end-strength, finding and coordinating with the appropriate reserve component command is essential to proper processing—it is the reserve component commander who decides whether or not the AWOL process will continue. If AWOL processing does continue, new active duty orders from the reserve component command are required and provide the authority to continue to the DFR process.

At the time of DFR: This process matters to judge advocates—when done properly, it not only drops the Soldier from the unit's rolls, but also preserves jurisdiction and tolls the statute of limitations on offenses occurring on active duty prior to the absence. The paperwork drill that follows the DFR, while cumbersome and on a short timeline, creates a robust deserter DFR packet that judge advocates can rely upon in the future.

Finally, at the time of RMC: Judge advocates must positively identify the duty status of the reserve component Soldier as either continuously remaining on active duty or returned to an inactive status during the course of the absence. If there is doubt regarding the continuous active duty status of the Soldier, an involuntarily recall to active duty for UMCJ action may be necessary. Such recall actions are accomplished through Format 460 orders issued by the regular Army unit's GCMCA. Further, if the unit anticipates restrictions on liberty, pretrial confinement, or confinement following court-martial, then approval by an Assistant Secretary of the Army is required—a process that can take weeks or even months to complete.

ILT Kham was ultimately sentenced to a dismissal and five years of confinement, but only after the military judge painstakingly reviewed evidence of the AWOL and RMC processes leading up to trial.¹⁰⁸ Soon thereafter, SSG Roberts had a very different outcome when he was administratively separated in lieu of court-martial, again after the military judge carefully reviewed his AWOL and RMC processing.¹⁰⁹ The difference came down to what orders remained available at the time of the respective trials that provided DA-level approval to confine, and the disparate outcome of the two otherwise-similar cases highlights how important it is for a judge advocate to know and follow the right procedures from the beginning. While no one single step is particularly difficult to complete, simply knowing what must be done and who must be involved is half the battle—and now you know!

¹⁰⁷ *Id.*

¹⁰⁸ The military judge found ILT Kham remained in a continuous state of active duty based upon the local orders in 2009 extending her active duty status at the time she was assigned to the unit with authority to convene courts-martial. Those orders, being published by order of the Secretary of the Army, were adjudged sufficient to allow for confinement in spite of later local orders lacking secretarial approval. SSG Roberts' similar extension orders were, by clerical error at Army Human Resources

Command, revoked during the period of his absence and prior to his RMC. Professional Experiences, *supra* note 2.

¹⁰⁹ In a pre-trial motions hearing, the military judge found the Government did not show SSG Robertson remained in a continuous state of active duty, and with the remaining local orders lacking secretarial approval to confine, he ruled confinement could not be adjudged following any finding of guilt in his trial. Given the extraordinary costs of holding the trial again at a later date and without any hope confinement, the command administratively separated the Soldier in lieu of court-martial. *Id.*

Appendix A: DA Form 4187 "Personnel Action"

PERSONNEL ACTION		
For use of this form, see PAM 600-8; the proponent agency is DCS, G-1.		
DATA REQUIRED BY THE PRIVACY ACT OF 1974		
AUTHORITY: Title 10, USC, Section 3013, E.O. 9397 (SSN), as amended PRINCIPAL PURPOSE: To request or record personnel actions for or by Soldiers in accordance with DA PAM 600-8. ROUTINE USES: The DoD Blanket Routine Uses that appear at the beginning of the Army's compilation of systems of records may apply to this system. DISCLOSURE: Voluntary; however failure to provide Social Security Number may result in a delay or error in processing the request for personnel action.		
1. THRU <i>(Include ZIP Code)</i> U.S. Army Deserter Information Point ATTN: ATZK-PMF-D Building 1481, Old Ironsides Avenue, Fort Knox, KY 40121-5238	2. TO <i>(Include ZIP Code)</i>	3. FROM <i>(Include ZIP Code)</i>
SECTION I - PERSONAL IDENTIFICATION		
4. NAME <i>(Last, First, MI)</i>	5. GRADE OR RANK/PMOS/AOC	6. SOCIAL SECURITY NUMBER
SECTION II - DUTY STATUS CHANGE (AR 600-8-6)		
7. The above Soldier's duty status is changed from <u>present for duty</u> to <u>absent without leave</u> effective _____ hours, _____		
SECTION III - REQUEST FOR PERSONNEL ACTION		
8. I request the following action: <i>(Check as appropriate)</i>		
<input type="checkbox"/> Service School <i>(Enl only)</i>	<input type="checkbox"/> Special Forces Training/Assignment	<input type="checkbox"/> Identification Card
<input type="checkbox"/> ROTC or Reserve Component Duty	<input type="checkbox"/> On-the-Job Training <i>(Enl only)</i>	<input type="checkbox"/> Identification Tags
<input type="checkbox"/> Volunteering For Oversea Service	<input type="checkbox"/> Retesting in Army Personnel Tests	<input type="checkbox"/> Separate Rations
<input type="checkbox"/> Ranger Training	<input type="checkbox"/> Reassignment Married Army Couples	<input type="checkbox"/> Leave - Excess/Advance/Outside CONUS
<input type="checkbox"/> Reassignment Extreme Family Problems	<input type="checkbox"/> Reclassification	<input type="checkbox"/> Change of Name/SSN/DOB
<input type="checkbox"/> Exchange Reassignment <i>(Enl only)</i>	<input type="checkbox"/> Officer Candidate School	<input type="checkbox"/> Other <i>(Specify)</i>
<input type="checkbox"/> Airborne Training	<input type="checkbox"/> Asgmt of Pers with Exceptional Family Members	
9. SIGNATURE OF SOLDIER <i>(When required)</i>		10. DATE (YYYYMMDD)
SECTION IV - REMARKS (Applies to Sections II, III, and V) (Continue on separate sheet)		
SECTION V - CERTIFICATION/APPROVAL/DISAPPROVAL		
11. I certify that the duty status change <i>(Section II)</i> or that the request for personnel action <i>(Section III)</i> contained herein - <input type="checkbox"/> HAS BEEN VERIFIED <input type="checkbox"/> RECOMMEND APPROVAL <input type="checkbox"/> RECOMMEND DISAPPROVAL <input type="checkbox"/> IS APPROVED <input type="checkbox"/> IS DISAPPROVED		
12. COMMANDER/AUTHORIZED REPRESENTATIVE	13. SIGNATURE	14. DATE (YYYYMMDD)

15. NAME OF INDIVIDUAL		16. SSN	
ADDENDUM - RECOMMENDATIONS FOR APPROVAL/DISAPPROVAL			
AUTHORITY	a. TO	b. FROM	
c. ACTION: <input type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED RECOMMEND: <input type="checkbox"/> APPROVAL <input type="checkbox"/> DISAPPROVAL			
d. NAME (Last, First, Middle)		e. RANK	f. DATE (YYYYMMDD)
g. TITLE/POSITION		h. SIGNATURE	
i. COMMENTS			
AUTHORITY	a. TO	b. FROM	
c. ACTION: <input type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED RECOMMEND: <input type="checkbox"/> APPROVAL <input type="checkbox"/> DISAPPROVAL			
d. NAME (Last, First, Middle)		e. RANK	f. DATE (YYYYMMDD)
g. TITLE/POSITION		h. SIGNATURE	
i. COMMENTS			
AUTHORITY	a. TO	b. FROM	
c. ACTION: <input type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED RECOMMEND: <input type="checkbox"/> APPROVAL <input type="checkbox"/> DISAPPROVAL			
d. NAME (Last, First, Middle)		e. RANK	f. DATE (YYYYMMDD)
g. TITLE/POSITION		h. SIGNATURE	
i. COMMENTS			
AUTHORITY	a. TO	b. FROM	
c. ACTION: <input type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED RECOMMEND: <input type="checkbox"/> APPROVAL <input checked="" type="checkbox"/> DISAPPROVAL			
d. NAME (Last, First, Middle)		e. RANK	f. DATE (YYYYMMDD)
g. TITLE/POSITION		h. SIGNATURE	
i. COMMENTS			

Appendix B: DD Form 553 "Deserter/Absentee Wanted by the Armed Forces"

DESERTER/ABSENTEE WANTED BY THE ARMED FORCES						1. DATE PREPARED
2. TO			3. FROM			4. DISTRIBUTION
5. ABSENTEE IDENTIFICATION						
a. NAME			b. GRADE/RANK/RATE		c. SEX	
d. ETHNICITY (<i>X one</i>)		e. RACE		NATIVE HAWAIIAN OR OTHERPACIFIC ISLANDER		
<input type="radio"/> HISPANIC OR LATINO <input type="radio"/> NOT HISPANIC OR LATINO <input type="radio"/> DECLINE TO RESPOND		<input type="checkbox"/> AMERICAN INDIAN/ALASKA NATIVE <input type="checkbox"/> ASIAN <input type="checkbox"/> BLACK OR AFRICAN AMERICAN		<input type="checkbox"/> WHITE <input type="checkbox"/> DECLINE TO RESPOND		
f. PLACE OF BIRTH		g. DATE OF BIRTH		h. HEIGHT	i. WEIGHT	
j. EYE COLOR			k. HAIR COLOR			
<input type="radio"/> BLACK <input type="radio"/> BLUE <input type="radio"/> BROWN <input type="radio"/> GREEN <input type="radio"/> GRAY <input type="radio"/> HAZEL <input type="checkbox"/> VIOLET			<input type="radio"/> AUBURN <input type="radio"/> BLACK <input type="radio"/> BLOND <input type="radio"/> BROWN <input type="radio"/> GRAY <input type="radio"/> RED <input type="radio"/> SILVER <input type="radio"/> WHITE <input type="radio"/> BALD			
l. DIP CONTROL NUMBER		m. BRANCH OF SERVICE	n. SOCIAL SECURITY NO.	o. CITIZENSHIP	p. MARITAL STATUS	
q. MILITARY OCCUPATION			s. PERMANENT RESIDENCE ADDRESS			
r. CIVILIAN OCCUPATION						
6. CURRENT ENLISTMENT			7. ENTRY INTO CURRENT PERIOD OF SERVICE		8. ATTACH PHOTOGRAPH	
a. DATE	b. PLACE		a. DATE	b. PLACE		
9. TIME OF ABSENCE			10. ADMINISTRATIVE DATE OF DESERTION			
a. DATE	b. HOUR					
11. ESCAPED OR SENTENCED PRISONER			12. DISCHARGE STATUS			
<input type="radio"/> YES <input type="radio"/> NO	IF "YES," SPECIFY CHARGE		a. DISCHARGED	<input type="radio"/> YES <input type="radio"/> NO	<input type="radio"/> YES <input type="radio"/> NO	
13. OPERATOR'S LICENSE			14. VEHICLE LICENSE			
a. NUMBER	b. STATE	c. EXP. DATE	a. PLATE NO.	b. STATE	c. EXP. DATE	d. TYPE
15. VEHICLE						
a. VEHICLE IDENTIFICATION NUMBER		b. YEAR	c. MAKE	d. MODEL	e. STYLE	f. COLOR
16. RELATIVES AND/OR PERSONS KNOWN BY ABSENTEE						
a. NAME			b. ADDRESS			
(1)						
(2)						
(3)						
(4)						
(5)						

DD FORM 553, MAR 2015

PREVIOUS EDITION IS OBSOLETE.

Page 1 of 3 Pages
Adobe Professional X

17. CERTIFICATION

The undersigned states: That he/she is a commissioned officer of the United States _____ presently assigned as the Commanding Officer, _____ and in the performance of official duties imposed by Department of Defense Directive 1325.2 and _____, he/she has conducted an investigation into the status of _____, a member of the United States Armed Forces serving on active duty with _____, by questioning his/her unit cohorts; by examining and verifying the field service records of said service member which reflect his/her duty status; by requesting the member's next of kin to urge his/her voluntary return to military control if they are aware of his/her whereabouts; by inquiring to the fullest extent possible into the feasibility of other explanations for the member's absence, to include sickness, injury, hospitalization, and confinement by civil law enforcement officials; and officially ordered diversion from his/her unit of assignment by querying the member's losing unit (and en route temporary duty unit), the appropriate career management division, the servicing replacement organization, and the servicing Military Personnel and Transportation Assistance Office (and _____).

That based on the aforesaid investigation, the undersigned has personal knowledge that, on or about _____, _____, did, without authority and with intent to remain away therefrom permanently, absent himself/herself from his/her unit/organization/place of duty, to wit: _____ located at _____ in violation of Section 885, Title 10, United States Code and he/she has remained continuously so absent until _____. I state under penalty of perjury (under the laws of the United States of America) that the foregoing is true and correct. Executed on _____.

NOTES:

- 1. For use only when a servicemember fails to report to a gaining unit of assignment during a permanent change of station.
- 2. For use only when statement is executed outside the United States, its territories, possessions and commonwealths.

18. COMMANDING OFFICER

a. TYPED NAME	b. RANK	c. TITLE
d. ORGANIZATION AND INSTALLATION	e. SIGNATURE	f. DATE SIGNED

19. REMARKS

INFORMATION

1. AUTHORITY TO APPREHEND.

a. Any civil officer having the authority to apprehend offenders under the laws of the United States, or of a State, territory, commonwealth, possession, or the District of Columbia may summarily apprehend deserters from the Armed Forces of the United States and deliver them into custody of military officials. Receipt of this form and a corresponding entry in the FBI's NCIC Wanted Person File, or oral notification from military officials or Federal law enforcement officials that the person has been declared a deserter and that his/her return to military control is desired, is authority for apprehension.

b. Civil authorities may apprehend absentees (AWOL's) when requested to do so by military authorities.

2. PAYMENT OF REWARD OR REIMBURSEMENT FOR EXPENSES.

a. Rewards. Receipt of this form, or oral or written notification from military authorities or Federal law enforcement officials, prior to apprehension of the individual, that the person is an absentee and that his/her return to military control is desired will be considered as an offer of reward. Persons or agency representatives (except salaried officers or employees of the Federal Government or servicemembers) apprehending or delivering absentees to military control are authorized:

- (1) Payment for apprehension and detention of absentees until military authorities resume custody, or
- (2) Payment for apprehension and delivery of absentees to a military installation.

b. Reimbursement for Expenses. Reimbursement may be made for actual expenses incurred when conditions for payment of a reward cannot be met. If two or more persons perform these services, payment will be made jointly or severally, but total payment to all may not exceed prescribed limitations.

c. Payment. Payment will be made to the person or agency representative actually making arrest and detention or delivery by the disbursing officer servicing the military facility to which the absentee is delivered and will be in full satisfaction of all expenses of apprehending, keeping, and delivering the absentee. Payment will be made whether the absentee surrenders or is apprehended. Payment will not be made for information leading to apprehension, nor for apprehension

not followed by return to military control. Both reward and reimbursement may not be paid for the same apprehension and detention or delivery.

3. INDIVIDUAL CLAIMS HE/SHE IS NOT ABSENT WITHOUT AUTHORITY.

When a detained individual claims that he/she is not absent without leave and does not have the papers to prove his/her claim, the apprehending person or agency representative should communicate directly by the most rapid means available, with the nearest military installation manned by active duty personnel. When necessary, communicate directly by telephone with the Deserter Information Point of the military service concerned.

a. US Army: Department of the Army
USADIP (DAPM-MPO-AD)
Bldg. 298, Room 332
481 Gold Vault Rd.
Fort Knox, KY 40121-5182

Telephone: Area Code (502) 626-3711/
3712/3713

b. US Navy: Navy Absentee Collection and
Information Center (NACIC)
Navy Personnel Command
(PERS-00D)
5720 Integrity Drive
Millington, TN 38055

Telephone: 901-87402522
Collect: 1-877-663-6772

c. US Marine Corps: Commandant, US Marine Corps
Law Enforcement and Corrections
Branch (PSL Corrections)
Naval Support Facility
701 South Courthouse Rd., Suite 2D095
Arlington, VA 22204-2478

Telephone collect: Area Code (703) 614-3248/3376

d. US Air Force: Headquarters AF Personnel Center
(DPWCM)
550 C Street West, Suite 14
Randolph AFB, TX 78150-4716

Telephone collect: Area Code (210) 566-3752
(or toll free: 1-800-531-5501)

Appendix C: DD Form 616 "Report of Return of Absentee"

REPORT OF RETURN OF ABSENTEE		REPORT CONTROL SYMBOL
		DD-P&R(SA)1454
<p align="center">IMPORTANT NOTICE</p> <p>The absentee status of the individual named below has been terminated. Military records indicate that your agency was specifically furnished a copy of DD Form 553, "Deserter/ Absentee Wanted by the Armed Forces," soliciting your support. Request you clear your records of the DD Form 553 pertaining to this individual and the associated unauthorized absence indicated on this report. The Department of Defense and the Military Service law enforcement officials concerned gratefully acknowledge your participation and support of military apprehension programs.</p>		1. DISTRIBUTION (Same as DD Form 553 at time of absence)
2. NAME OF ABSENTEE (Last, First, Middle Initial)		
3. SERVICE	4. SOCIAL SECURITY NO.	5. GRADE OR RATE
6. FORMER ABSENTEE STATUS		
a. FORMER STATUS (X one) <input type="radio"/> (1) ESCAPED OR SENTENCED PRISONER <input type="radio"/> (2) ABSENTEE <input type="radio"/> (3) DESERTER (Administrative)		b. DATE/HOUR ABSENCE BEGAN (YYYYMMDD)
c. ORGANIZATION AND INSTALLATION FROM WHICH ABSENT		
7. CIRCUMSTANCES OF ABSENTEE'S RETURN		
a. MODE OF RETURN (X one) <input type="radio"/> (1) APPREHENDED <input type="radio"/> (2) SURRENDERED		b. AUTHORITIES TO WHOM ABSENTEE SURRENDERED OR BY WHOM APPREHENDED (X one) <input type="radio"/> (1) MILITARY <input type="radio"/> (2) CIVIL <input type="radio"/> (3) FBI <input type="radio"/> (4) DIS <input type="radio"/> (5) OTHER (Specify)
c. PLACE OF INITIAL RETURN		d. DATE/HOUR OF INITIAL RETURN (YYYYMMDD)
e. REQUIRED ACTION (X one) <input type="radio"/> (1) RETURN TO MILITARY CONTROL <input type="radio"/> (2) RETAINED BY CIVIL AUTHORITIES <input type="radio"/> (3) CIVIL CHARGES <input type="radio"/> (4) SAFEKEEPING		
f. MILITARY ORGANIZATION AND INSTALLATION OR CIVILIAN LOCATION		g. DATE RETURNED TO MILITARY CONTROL (YYYYMMDD)
8. DISPOSITION OF ABSENTEE		
a. ACTION BY MILITARY AUTHORITIES (X one) <input type="radio"/> (1) RETAINED <input type="radio"/> (2) TRANSFERRED <input type="radio"/> (3) TECHNICAL ARREST ORDERS <input type="radio"/> (4) GUARD		b. TO (Name of Command in charge of absentee)
		c. COST OF TRANSPORTATION (To be charged to the individual's account) \$
9. REMARKS (Include location of Service, Pay and Health Records)		
10. AUTHORIZING OFFICIAL		
a. TYPED NAME (Last, First, Middle Initial)	b. GRADE	c. TITLE
d. ORGANIZATION	e. SIGNATURE (Sign all copies)	f. DATE SIGNED (YYYYMMDD)

DD FORM 616, DEC 1999

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Appendix D: Format 440 “Orders For Assignment or Attachment”

*(Letterhead.)*¹

*(Enter order number.)*²

*(Enter date.)*³

(Enter standard name line.)^{4,5}

You are attached or released from attachment as shown.⁶

Action:^{7,8} (Enter the action.)

Effective date: (Enter the effective date.)

Period: (Enter the period.)

Purpose:⁹ (Describe the purpose.)

Accounting classification: (Enter the accounting classification.)

Additional instructions:^{10,11,12,13} (Enter any authorized additional instructions.)

Format: (Enter 440.)

*(Enter authentication.)*¹⁴

*(Enter signature block.)*¹⁵

*(Enter distribution.)*¹⁶

Notes:

¹ Letterhead. See paragraph 2-3 and figure 2-1, note 1.

² Order number. See paragraph 2-3 and figure 2-1, note 2.

³ Date. See paragraph 2-16 and figure 2-1, notes 3 and 4.

⁴ Standard name line. See paragraph 2-5.

⁵ For reception stations, add a Series and Line Number or a Company Code and Line Number after the standard name line.

⁶ DA Form 4187 (Personnel Action) may be used instead of Format 440 to announce—

a. Attachment when a soldier is to be attached to a unit at the same geographical location and in the same battalion as his or her unit of assignment. Use Format 440 if a soldier is to be attached to a unit at a different geographical location and/or in a different battalion as his or her unit of assignment.

b. Release from attachment when DA Form 4187 was used to announce the attachment and another document is needed to announce that the soldier is to be released from attachment.

⁷ Enter one or a combination of the following statements: “You are attached to” (enter organization), “You are released from attachment to” (enter organization), or “You are further attached to” (enter organization), or a statement shown in AR 630-10, paragraph 5-3, as appropriate.

⁸ Add an Assigned to (enter standard name line of losing organization) headline before the Action headline for a group action when the organization shown as the response to the Assigned to headline and the response to the Action headline are the same for all soldiers. Do not include the unit and station of assignment in the standard name line.

⁹ The Purpose headline may be used to show the reason a soldier is attached, for example, “Pending clarification of your status after return to military control from absent without leave.”

¹⁰ Additional instructions. See paragraph 2-9 and table 2-2.

¹¹ When appropriate, include the following statement: “On completion, you will return to your permanent station.”

¹² For soldiers on the TDRL ordered to report for a periodic physical examination, include the following statement: “Transportation request permitting travel at Government expense may be obtained at the nearest military installation or recruiting station. Maximum use of transportation request is encouraged. For travel by commercial carrier or privately owned vehicle at personal expense, a monetary allowance for the distance traveled is authorized. You will return home on completion of examination and release by hospital commander.”

Appendix E: DD Form 460 “Provisional Pass”

PROVISIONAL PASS		
ISSUED AT	SERVICE NO.	GRADE/RATE
ORGANIZATION		
STATION		
FROM (Location)	TO (Location)	
ISSUED AT	DATE	TIME
ISSUED BY (Name, Grade/Rate, Organization)		

DD Form 460, MAR 51

REPLACES WD AGO FORM 19-75, 1 JUN 45 WHICH IS OBSOLETE

ORDER:	
<p>The bearer is ordered to proceed by the most direct route on the first available transportation, and to report on arrival to his commanding officer.</p>	
ACKNOWLEDGMENT:	
<p>I hereby acknowledge receipt of the above order. I understand that: (1) refusal or failure to obey this order will subject me to trial by courts-martial, and (2) this order in no way mitigates or terminates the liability for disciplinary action involved in any previous actions by me.</p>	
SIGNATURE	DATE

DD Form 460 Reverse, MAR 51

Adobe Professional 7.0

COPIES: 1 - FOR BEARER 2 - FOR FILE 3 - FOR COMMANDING OFFICER

Appendix F: Format 460 “Orders for Involuntary Recall to Active Duty”

*(Letterhead.)*¹

*(Enter order number.)*²

*(Enter date.)*³

*(Enter standard name line.)*⁴

You are ordered to active duty in the grade shown above for the period shown in the active duty commitment below. You will proceed from your current location in time to report on the date shown below.

Report to: (Enter the report to unit or organization.)

Reporting date: (Enter the reporting date.)

Assigned to: (Enter the unit of assignment (including UIC) and station of assignment.)

Active duty commitment: (Enter the active duty commitment.)

Purpose: (Enter “UCMJ processing.”)

Additional instructions: (Enter “Individual is relieved from present Reserve assignment on the day before the effective date of active duty. Individual will be ordered to active duty in his or her current grade and is excluded from the Active Army officer strength-in-grade limitations. Shipment of household goods and travel of family members is not applicable.”)

FOR ARMY USE

Auth: (Enter “Section 802d, title 10, USC.”)

HOR: (Enter the HOR.)

PPN:⁵ (Enter the PPN.)

Res grade: (Enter the reserve grade.)

DOR: (Enter the date on which DFR.)

Basic br: (Enter the basic branch.)

PEBD: (Enter the PEBD.)

Accounting classification: (Enter the accounting classification.)

MDC:⁶ (Enter the MDC.)

Place EAD or OAD: (Enter the place of EAD or OAD.)

PMOS/AOC: (Enter the PMOS or AOC.)

SEX: (Enter M or F.)

COMP: (Enter the comp.)

Format: (Enter 460.)

*(Enter authentication.)*⁷

*(Enter signature block.)*⁸

*(Enter distribution.)*⁹

DEPARTMENT OF THE ARMY
HEADQUARTERS, [UNIT]
LETTERHEAD



[OFFICE SYMBOL]

MEMORANDUM FOR Commander, UNIT (GCMCA)

SUBJECT: Involuntary Order to Active Duty of [RANK, FULL NAME, FULL SSN, Unit, Installation, Zip Code]

1. For Decision.
2. Purpose. To request that the Secretary of the Army concur with the order placing [RANK, LAST NAME] on active duty to face court-martial charges for which confinement is contemplated in accordance with AR 27-10, paragraph 20-3.
3. Background and Discussion.
 - a. Personal Data.
 1. Rank/Name:
 2. Social Security Number:
 3. Military status and component:
 4. Unit and location:
 5. ETS:
 6. Home address:
 7. Marital Status/Dependents:
 8. Education:
 9. Previous Article 15s and convictions:
 10. Restraint:
 - b. Factual Background. BRIEF STATEMENT OF FACTS
 - c. Discussion. BRIEF DISCUSSION OF AVAILABILITY OF WITNESSES/EVIDENCE
4. Potential Witnesses.
 - a.
 - b.
 - c.
5. Maximum Punishment. The maximum allowable punishment includes:
6. Conclusion. The seriousness of the alleged offenses warrants the involuntary activation of [Rank, Last Name]. To ensure that execution of any adjudged confinement is a lawful option available in accordance with Article 2(d)(5), UCMJ, and AR 27-10, paragraph 20-3, I recommend that you sign the enclosed request for the Secretary of the Army to approve your order of [Rank, Last Name] to active duty

7. Point of contact for this memorandum is [SJA] at [SJA CONTACT INFO] or [MJ MANAGER] at [MJ MANAGER CONTACT INFO].

JOHN DOE
COL, JA
Staff Judge Advocate



DEPARTMENT OF THE ARMY
HEADQUARTERS, [UNIT]
LETTERHEAD

[OFFICE SYMBOL]

[DATE]

MEMORANDUM FOR Assistant Secretary of the Army (Manpower and Reserve Affairs), ATTN: Office of the Judge Advocate General, Criminal Law Division, 2200 Army Pentagon, Room 3D548, Washington, DC 20310-2200

SUBJECT: Involuntary Order to Active Duty of [RANK, FULL NAME, FULL SSN, Unit, Installation, Zip Code]

1. On [DATE OF ACTIVE DUTY ORDERS], I ordered [RANK, LAST NAME] to active duty for the purpose of military justice proceedings. I request that the Secretary of the Army approve the order so that a court-martial, if this matter is referred to one, may adjudicate a sentence that includes confinement.
2. There is credible evidence that [RANK, LAST NAME] committed the following misconduct: [GENERAL NATURE OF THE CHARGES]. [RANK, LAST NAME] committed the misconduct while in a 10 USC (Title 10) duty status (during annual training)(while mobilized) at [LOCATION WHILE IN TITLE 10].
3. Article 2(d), UCMJ, authorizes the involuntary recall to active duty of a Reserve Component member for disposition of alleged offenses that occurred while that member was in a Title 10 duty status. Army Regulation 27-10, paragraph 20-3, provides that only an Active Army General Court-Martial Convening Authority (AA GCMCA) may order a Reservist to active duty. The regulation provides that if confinement of the Reservist is contemplated as a possible punishment, the Secretary of the Army must approve the active duty order.
4. As the AA GCMCA with support authority over the Reserve unit to which [RANK, LAST NAME] is assigned, I request that you approve my order so that [RANK, LAST NAME] may be sentenced to confinement if a court-martial so adjudges.
5. The point of contact for this memorandum is [SJA] at [SJA CONTACT INFO] or [MJ MANAGER] at [MJ MANAGER CONTACT INFO].

- 5 Encls
1. SJA Recommendation
 2. Orders to Active Duty
 3. [DRAFT] Charge Sheet
 4. [SUPPORTING DOCS]
 5. ORB/ERB/DA Form 2-1

[COMMANDER'S NAME]
Major General, USA
Commanding

Appendix I: Sample GCMCA Notification Memo to Reserve Soldier



DEPARTMENT OF THE ARMY
HEADQUARTERS, [UNIT]
LETTERHEAD

[OFFICE SYMBOL]

[DATE]

MEMORANDUM FOR [RANK, NAME, UNIT]

SUBJECT: Involuntary Order to Active Duty

1. In accordance with Article 2(d) of the Uniform Code of Military Justice and Army and Regulation 27-10, paragraph 20-3, and Army Regulation 135-200, Chapter 7, I have directed that you will be recalled to active duty for the administration of military justice regarding alleged violations of the Uniform Code of Military Justice that occurred while you were serving in a 10 USC (Title 10) duty status.
2. You are directed to report for duty at the time and place indicated on the enclosed orders. Failure to comply is punishable under the Uniform Code of Military Justice.

Encl

[COMMANDER'S NAME]
Major General, USA
Commanding

A copy of this correspondence and the enclosed orders were personally delivered to me on the date indicated below. I understand that I must report for duty at the time and location indicated on said orders.

Date: _____

[SIGNATURE BLOCK]



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
MANPOWER AND RESERVE AFFAIRS
111 ARMY PENTAGON
WASHINGTON DC 20310-0111

[OFFICE SYMBOL]

[DATE]

MEMORANDUM FOR [RANK, NAME, UNIT]

SUBJECT: Approval of Involuntary Order to Active Duty, SGT John Doe

1. I approve the involuntary order to active duty of Sergeant John Doe in accordance with Article 2(d), Uniform Code of Military Justice, and Army Regulation 27-10, paragraph 20-3.
2. The point of contact for this action is Major Judge Advocate at (571) 256-8134 or judge.advocate.mil@mail.mil.

SIGNATURE BLOCK
Assistant Secretary of the Army
(Manpower and Reserve Affairs)

Ghost Fleet: A Novel of the Next World War¹

Reviewed by Major Justin Moore*

*Avoid overconfidence as it will lead to disaster.*²

I. Introduction

The future threat may never be identified by such militants as we but it is no less likely to occur. The rank and file of our military are not always the most forward thinking bunch. It has even been whispered, at times, that some of our most educated and experienced military leaders, and the civilian politicians that give them their direction, are reactionary.³ Since we have a host of known threats facing our nation and our military, it seems unnecessary to think too far outside the box.

Why get creative when we have plenty of existing battle drills to perfect? We create training exercises based on the threats we know exist and spend little time trying to fathom the unfathomable. Since our rigid military brains lack creativity it is necessary for dreamers, artists, and authors to think thoughts that we do not allow ourselves to explore. It is for that reason we should expose ourselves to books like *Ghost Fleet*. Quoted throughout the book is the ancient Chinese military strategist, Sun Tzu, who said, “Attack your enemy where he is unprepared. Appear where you are unexpected.”⁴

Ghost Fleet is a story of unexpected future threats written by two men who have made their careers out of studying and discussing the possible future of war.⁵ Singer and Cole “[meld] non-fictional style research on emerging trends and technology with a fictional exploration of what the future of war at sea, on land, in the air, space, and cyberspace [sic] . . .” may soon resemble.⁶ According to the authors preface, the book “was inspired by real-world trends and technologies. But, ultimately it is a work of fiction, not prediction.”⁷

* Judge Advocate, U.S. Army.

¹ P. W. SINGER & AUGUST COLE, *GHOST FLEET: A NOVEL OF THE NEXT WORLD WAR* (2015).

² *Id.* at 32 (“Didn’t General Sun also say, ‘Avoid overconfidence, as it will lead to disaster?’”). The author presumably meant to attribute this quotation to Sun Tzu’s *The Art of War*; however, this statement does not seem to appear in the copies of the book that I searched. Due to the age of *The Art of War* and countless translations over the centuries, the quote may or may not be accurate.

³ Erick Schmitt, *Iraq-Bound Troops Confront Rumsfeld Over Lack of Armor*, N.Y. TIMES (Dec. 8, 2004), http://www.nytimes.com/2004/12/08/international/middleeast/iraqbound-troops-confront-rumsfeld-over-lack-of.html?_r=0 (noting an obvious and widely discussed example of the military’s reactionary nature when it comes to preparing for the war that we last fought rather than the one that we are about to fight).

⁴ SINGER & COLE, *supra* note 1, at 35.

⁵ *Authors*, *GHOST FLEET BOOK*, <http://www.ghostfleetbook.com/authors/>

II. Summary

Although a futuristic look at an incomprehensible attack, the possibility of the next world war is as daunting as it is possible. The opening scene of *Ghost Fleet* is a foreshadowing to the ultimate decision by the Chinese to correct the hierarchy of our current world order.⁸ As the Chinese discover the means to become energy-self-sufficient in the Mariana Trench, their researchers are harassed by the cocky and overconfident U.S. military.⁹ In order to capitalize on the discovery in the United States’ Exclusive Economic Zone, China is faced with the decision of whether to manifest *their* destiny through war.¹⁰

China goes on the attack. The Chinese softened the battlefield by planting malware in all of our modern equipment, from jets and ships to our organic networks and Google Glass-like *Viz* goggles.¹¹ We are a soft target. In the preceding years, America failed to modernize and fully fund many of its most promising and technologically-advanced programs.¹² With virtually no space-based communications left, we are confronted with an overwhelmingly successful attack on Hawaii, reminiscent of the Japanese’s attack on Pearl Harbor. United States commanders are forced to reckon with a new fog of war created by jammers and false data from our own systems.¹³

After the loss of Hawaii to the Chinese and their new Russian ally, America employs an innovative and secret strategy. When faced with a technologically superior force, which essentially controls all of America’s modern fleet by circumventing the human operators, a force free of technology and capable of evading surveillance is the only

(last visited Mar. 22, 2017).

⁶ P.W. Singer, *GHOST FLEET BOOK*, <http://www.ghostfleetbook.com/member/p-w-singer/> (last visited Mar. 22, 2017).

⁷ SINGER & COLE, *supra* note 1, at v.

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.* at 29.

¹¹ *Id.* at 12, 80.

¹² *Id.* at 45. The antagonist’s first target is a U.S. Air Force satellite, the WGS-4, which entered space in 2012. *Id.* (“Costing over three hundred million dollars. . . . The Pentagon had planned to put up a whole constellation of these satellites to make the network less vulnerable to attack, but contractor cost overruns had kept the number down to just six.”).

¹³ *Id.* at 325.

way to counterattack.¹⁴ The thought-provoking story is told by weaving a variety of characters' lives into the mix. Most notably the somewhat estranged father of a Navy captain serves as a contracted, retired chief.¹⁵ Dubbed the ghost fleet, his job is servicing the Navy's reserve fleet¹⁶ in coastal California. His crude and archaic ways and independence from gadgets and modern advancements is an allegory for the ships he maintains. Among those ships sits the newest arrival¹⁷ the USS *Zumwalt*¹⁸ which, due to its early commissioning date in September of 2016 and lack of Chinese tainted microchips, will eventually be America's last chance in successfully mounting an attack against the Chinese and Russian Navies. Adding to the drama, the "Z" is skippered by none other than the old chief's son.¹⁹

As we are coldly educated on what it would be like on the losing side of a war against another superpower, we are also entertained. The lives of a rogue resistance living in occupied Hawaii, an eccentric billionaire turned space mercenary, a burgeoning love affair between the old chief and the younger, Chinese-American engineer on the *Zumwalt*, and a woman dubbed "the black widow" for her practice of luring Chinese marines to their demise all serve to amuse and entertain readers while assaulting them with harsh lessons that a creative look at potential future threats provides.

III. Abandon Ship

Singer and Cole make quick work of the idea that America's allies will be ready to stand by our side when the worst happens. With one quick, decisive, and monumental loss to China in a place where so much of our fleet is based, they invite readers to contemplate what value the United States would be to our North Atlantic Treaty Organization (NATO) allies in Europe after ". . . a war already seemingly lost in the Pacific."²⁰ With America on the ropes allies become noticeably scarce,²¹ another stretch not outside the

realm of possibility if the worst happened. The indignant Americans still have some cards to play, though, when they strike a secret deal with Poland to trade them nuclear assets for their older, untraceable submarines.²²

Bartering nuclear weaponry like a member of the axis of evil seems un-American but the authors persistently challenge us to put ourselves in the position of thinking about how to compete, alone, when the chips are down. In other areas of *Ghost Fleet* we are challenged to decide what laws of war would apply when losing means the obliteration of America as a relevant world power. "All the prewar concerns about setting robots [programmed to destroy anything made of metal] loose on the battlefield didn't seem to matter as much when you were on the losing side. Plus, there was no worry of collateral damage."²³

Wasting only a few pages, *Ghost Fleet* also conjures such huge questions as how may the world's global economy keep our allies from upsetting the new world order once the United States is summarily knocked from the top of the pyramid.²⁴ A lot has changed since the last world war and it is challenging to imagine how such a mutually reliant international community would react or survive if it's largest and most influential countries were feuding. Sealing the borders, interning Chinese-Americans, and halting trade would seem to do little to define battle lines where commerce between and among the two countries is their very lifeblood. In a great moment for Americans in the book, Walmart's international investors consider what it would mean to take sides.²⁵ Ultimately, the board patriotically votes to join the war effort, "America now had a new kind of logistical backbone the likes of which had never before been seen in war."²⁶ This is a prodigious moment where the reader may feel the momentum swing as the American underdogs load their great-American secret weapon. It is also a ruminative moment where we can ponder on the vast assets our country

¹⁴ *Id.* at 77 (explaining that Chinese were able to control what the American military saw on their screens because of pre-planted Trojan-Horse-like programs in microchips purchased from China by American subcontractors).

¹⁵ *Id.* at 9.

¹⁶ Gary Bearden, *Book Review: Ghost Fleet and the Future Of Great Power War*, THE DIPLOMAT (July 7, 2015), <http://thediplomat.com/2015/07/book-review-ghost-fleet-and-the-future-of-great-power-war/> ("The book's title, Ghost Fleet, comes from an expression used in the U.S. Navy that refers to partially or fully decommissioned ships kept in reserve for potential use in future conflict. These ships, as one might imagine, are older and naturally less technologically sophisticated than their modern counterparts.").

¹⁷ SINGER & COLE, *supra* note 1, at 10.

¹⁸ Jennifer McDermott, *Navy Gives Look Inside Futuristic \$4.4B Zumwalt Destroyer*, ASSOCIATED PRESS (Sept. 10, 2016), <http://www.military.com/daily-news/2016/09/10/navy-gives-look-futuristic-44b-zumwalt-destroyer.html> ("The 610-foot-long warship, built . . . in Maine, has an angular shape to minimize its radar signature and cost more than \$4.4 billion. It's the most expensive destroyer built for the Navy [at the time of publication]. . . . It looks like a much smaller vessel on radar and it's quieter than other ships, which makes it hard to detect, track and

attack. . . . [T]he Zumwalt's unique and significant capability to generate power could be used in ways perhaps not even envisioned yet, such as in the testing and use of laser and directed-energy weapons systems.").

¹⁹ SINGER & COLE, *supra* note 1, at 107.

²⁰ *Id.* at 132 ("But then, three days after the current conflict began, NATO's North Atlantic Council, its political body, voted not to join a war already seemingly lost in the Pacific.").

²¹ *Id.* ("In Europe, only one ally stands with the Americans: the no-longer-Great Britain, said Admiral Wang. NATO's dissolution had been a long time coming, but the alliance's sudden unraveling by a simple diplomatic vote was almost as big a shock to Washington as the Directorate's surprise attack had been.").

²² *Id.* at 286.

²³ *Id.* at 236.

²⁴ *Id.* at 157.

²⁵ *Id.*

²⁶ *Id.* at 158.

could tap if required by the calamities of war.²⁷ Still, one must also wonder what Walmart could contribute if not Chinese products.

IV. Teachable Moments

In this introspective book, it is shocking and almost believable how quickly the battle for Hawaii and the next world war was underway. The knockout blow was over almost before it started and with little counter. *Ghost Fleet* postulates that with the use of already contemplated cyberwarfare technology and the added dimension of a relatively small space assault a well-funded, tech-savvy opponent could cripple our communications and leave us with relatively little ability, even in spite of our vast war chest. With hampered communications, hardly any notice was taken that a space station was overthrown by most of the American military until it was too late.²⁸ As a cargo ship delivered the rolling stock necessary to occupy Hawaii, port workers assumed it was just the latest delivery of Chinese-made sport utility vehicles (SUVs) for distribution to the dealerships.²⁹ In an era where “the network is down again” is a phrase used more often than “live fire exercise” it is easy to envision an attack quietly underway in another location, aimed at another platform, and effectuated through another dimension while we, ourselves, wonder if we can get a workout in before the network is back up.

Ghost Fleet is a compelling story because, despite the creative license taken, this future attack seems somewhat plausible. Readers are continually confronted with science-fiction that hits eerily close to the mark of where current military capabilities and deficiencies stand and where they may be when we wake up tomorrow.³⁰ A constant and thought-provoking theme of the book is the detrimental impact that the never ending budget turmoil has had and will continue to have on military readiness.³¹ A view from the future helps us easily understand how the wrong budget cuts today can lead to weakness in important areas tomorrow. With battle scenes fit for a Hollywood thriller and the occasional Tarantino-style bloodbath,³² we come to know and sympathize with the seemingly dire plight of not only

Hawaiians left behind on the battle field but America as we know it. It is beneficial to wonder, is this fiction or prediction?³³

In a more specific example of our hubris in having generally been on the high ground of battle, we get the perspective of our own seasoned insurgents to the Chinese occupation.³⁴

The SEAL fire team moved with confidence rather than the stop-and-go of the insurgents. Where the NSM would have waited and watched for an hour to ensure an intersection in the trail was free of guards, the SEALs moved right through, the tiny robotic lobster they called Butter scurrying ahead, clearing the way.

Conan thought their noise discipline was terrible. It was not that they were loud; they were quiet, at least for predators. It was that they clearly had never been prey.³⁵

Each time we juxtapose our forces into the position of subordinate defenders rather than supreme aggressors the irony is notable. It is through these mind exercises that the benefits of creativity and fiction are evident. Whereas we always seem to prepare for the most recent war fought, *Ghost Fleet* gives us the opportunity to consider what some already believe is forthcoming.³⁶ Most importantly the book encourages us to explore the possibility of

fighting a more advanced and formidable force. One can only hope that the world’s shared, global economy is the new basis for a mutually assured destruction in the event of a war between super powers.

V. Conclusion

Ghost Fleet is more than a fictional novel leading us to ponder what innovative technology and advancement in medicine will allow us to do as a future force. It is a book that exposes the fragility of our current standing in the world and

²⁷ The Defense Production Act of 1950, 50 U.S.C.A. §§ 4501–4568 (2017).

²⁸ SINGER & COLE, *supra* note 1, at 47 (“Five pulses took out the narrowband communications network that linked all the American military’s aerial and maritime platforms, ground vehicles, and dismounted soldiers. . . . It was almost anticlimactic.”).

²⁹ *Id.* at 61.

³⁰ Travis J. Tritton, *House Panel: \$1 Trillion Needed to Reboot Military*, STARS & STRIPES (Sept. 22, 2016), http://www.military.com/daily-news/2016/09/22/house-panel-1-trillion-needed-to-reboot-military.html?ESRC=eb_160923.nl (“The House committee has been ringing an alarm over what it says is a military readiness crisis. Simmons said the committee uncovered evidence of deep and growing shortcomings within the military during recent fact-finding visits to bases throughout the United States.”).

³¹ SINGER & COLE, *supra* note 1, at 231.

³² *Id.* at 222 (“The box-cutter blade met his hand in the air and sliced off his left pinkie and ring finger. And then, in a frenzy, she was upon him, slashing again and again. She lost herself in the moment, hearing nothing at all, just the ringing in her ears and the beckoning peace.”).

³³ *Id.* at v.

³⁴ *Id.* at 296.

³⁵ *Id.*

³⁶ Tritton, *supra* note 30 (“Such an increase appears highly unlikely on Capitol Hill where budget gridlock and stop-gap legislative solutions have become normal. It foreshadows the hard political fight ahead for Republican defense hawks who want more money for a military that they say is depleted, inexperienced and unready for war with *major world powers such as Russia and China.*”).

our reliance on our own technology and assumptions. Less a *Star Wars*-style book of science-fiction and more a well-researched, somewhat realistic daydream on whether we have rested on our laurels and face unforeseen risks; I recommend this story for all audiences. Although it is a book which can be read for pure enjoyment by some it is a cautionary tale for our military and civilian leaders. This is the type of book that I, myself, would never have selected. Still, I find myself thinking deeply on never before considered possibilities and wanting more.

Blood Year: The Unraveling of Western Counterterrorism¹

Reviewed by Major Bruce H. Robinson*

The decision you face now, therefore, is crucial. Once large numbers of US troops are committed to direct combat they will begin to take heavy casualties in a war they are ill-equipped to fight in a non-cooperative if not downright hostile countryside. Once we suffer large casualties we will have started a well-nigh irreversible process. Our involvement will be so great that we cannot—without national humiliation—stop short of achieving our complete objectives. Of the two possibilities I think humiliation would be more likely than the achievement of our objectives—even after we had paid terrible costs.²

I. Introduction

In 1965, George Ball, Under Secretary of State for Economic and Agricultural Affairs, drafted a memorandum to President Lyndon Johnson urging him to deescalate the Vietnam conflict.³ In that memorandum, Ball predicted that escalation would lead to a feedback loop whereby the more casualties the United States took, the more troops it would commit to the fight, leading to one of only two possible outcomes: humiliation or victory.⁴ He believed the result would be humiliation.⁵ History would bear out the truth of Ball's eerily prescient prediction.

Ball was describing an escalation of commitment problem: a situation where things have gone wrong and corrective action is likely to compound or worsen the problem.⁶ Its cousin is the sunk cost fallacy, and it is known colloquially as throwing good money after bad.⁷ The echoes of Ball's warning to President Johnson reverberate from the pages of David Kilcullen's latest book, *Blood Year: The Unraveling of Western Counterterrorism*.

More than a decade after the invasions of Afghanistan and Iraq, the Middle East and North Africa are in turmoil. The Taliban is resurgent in Afghanistan.⁸ The Islamic State of Iraq and Syria (ISIS) controls large swaths of territory in Syria and Iraq,⁹ while claiming nineteen provinces¹⁰ across nine countries.¹¹ Syria is burning, and a Sunni-Shi'a proxy conflict simmers across the Middle East.¹² Meanwhile,

Russia, newly bellicose and eager to flex its muscles on the world stage, has entered the fray in Syria.¹³

How did we get here? Where do we go?¹⁴ These are the central questions that Kilcullen seeks to answer in *Blood Year*. In answering these questions, Kilcullen paints a grim picture of intractable sectarian division, strategic short-sightedness, and the danger of unforeseen consequences. Kilcullen argues that the West's counterterrorism strategies over the past fifteen years have failed, and that the West must change course strategically.

Blood Year is at its most effective in answering the first question: how did we get here? Less persuasive is Kilcullen's argument for the way forward: that the West should accept that we are in a Long War; cooperate with Russia in Syria; and commit to a ground war against ISIS.¹⁵

II. How Did We Get Here?

In building his argument that Western counterterrorism strategy has failed, Kilcullen spends a significant amount of time documenting both the devolution of the Middle East and North Africa over the past fifteen years and the rise of ISIS. This is the strongest aspect of *Blood Year* because Kilcullen is able to weave an incredibly complicated web of shifting organizations and entities, spread across several continents, into a cohesive and digestible narrative. He makes the opaque understandable. This is important, essential even, because in

¹ DAVID KILCULLEN, *BLOOD YEAR: THE UNRAVELING OF WESTERN COUNTERTERRORISM* (2016).

* Judge Advocate, U.S. Army.

² Memorandum from George Ball to President Lyndon B. Johnson (Jul. 1, 1965), in *FOREIGN RELATIONS OF THE UNITED STATES, 1964-1968, VOLUME III, VIETNAM, JUNE-DECEMBER 1965*, at 107 (David C. Humphrey et al. eds., 1996) (ebook).

³ *Id.* at 107-13.

⁴ *Id.* at 107.

⁵ *Id.*

⁶ Barry M. Shaw, *The Escalation of Commitment, an Update and Appraisal*, in *ORGANIZATIONAL DECISION MAKING 191* (Zur Shapira ed. 1997) (ebook).

⁷ *Id.* at 192.

⁸ KILCULLEN, *supra* note 1, at 174-79.

⁹ *Id.* at 197-98.

¹⁰ Bardia Rahmani & Andrea Tanco, *ISIS's Growing Caliphate: Profiles of Affiliates*, WILSON CTR. (Feb. 19, 2016), <https://www.wilsoncenter.org/article/isis-growing-caliphate-profiles-affiliates>.

¹¹ Priyanka Boghani, *Where the Black Flag of ISIS Flies*, PBS: FRONTLINE (May 13, 2016), <http://apps.frontline.org/isis-affiliates/>.

¹² KILCULLEN, *supra* note 1, at 197-98.

¹³ *Id.*

¹⁴ *Id.* at 4.

¹⁵ The Long War doctrine holds that the War on Terror will be a multi-generational struggle with intermittent periods of kinetic conflict. *Id.* at 200, 212-13, 215.

order to correct course, we must understand why we are failing.

Kilcullen explains ISIS' structure and how the political geography of Iraq and Syria facilitated its territorial gains.¹⁶ This section shows why ISIS will likely prove to be an enduring adversary. Kilcullen describes ISIS as having a "three-level structure: a state-like core entity in Syria-Iraq, external territories in other countries, and an ad hoc global network of supporters and sympathizers ... [that Kilcullen calls] the 'ISIS Internationale.'"¹⁷ Kilcullen's description of the "ISIS Internationale" sheds light on lone wolf terrorist attacks that have occurred throughout the West over the past few years.¹⁸ Prior to reading *Blood Year*, I perceived ISIS' repeated claims of responsibility for these attacks, when it was clear that there was no prior coordination, as mere opportunism by a media-savvy entity. Kilcullen challenges this characterization and recasts these attacks as an evolution in jihadist terrorism—the atomized threat.¹⁹ The author explains how the Western counterterrorism strategy of disaggregation spurred this evolution and had the dual effect of both saturating our intelligence bandwidth, making it difficult to identify and preempt emerging threats, while at the same time providing ISIS with public relations fodder.²⁰ This is a key distinction because it suggests that these attacks and ISIS' continued relevance in the media are the fuel for additional attacks, a self-perpetuating cycle. Kilcullen's description of the "ISIS Internationale" proved prescient as 2016 saw a number of remotely radicalized terrorist attacks, to include the Pulse nightclub shooting in Orlando, Florida;²¹ the Bastille Day attack in Nice, France;²² and bombings in Brussels, Belgium.²³

In Kilcullen's telling, the current state of affairs in the Middle East was brought about due to a series of Western blunders, unintended consequences, and sectarian animosity.²⁴ The 2003 invasion of Iraq destabilized the country allowing for the rise of Al-Qaeda in Iraq (AQI) and

other jihadist groups.²⁵ The 2011 withdrawal from Iraq unraveled all of the gains purchased through the Surge, providing room for the Maliki administration to inflame Sunni-Shi'a tensions in Iraq and allowing AQI, which had been decimated during the Surge, to recover and reconstitute as The Islamic State of Iraq and eventually ISIS.²⁶ Additionally, the killing of Osama bin Laden in 2011 had the unintended effect of creating a succession crisis within Al Qaeda, at the very moment that ISIS was emerging from the shadows and splintering away from Al Qaeda.²⁷ This succession crisis limited Al Qaeda's ability to respond to ISIS' rebellion.²⁸ At the same time, the Arab Spring uprisings swept across North Africa and the Middle East spreading instability and creating opportunity for ISIS and other jihadist groups.²⁹ Western actions in Libya, to include wildly unpopular drone strikes, helped topple Muammar Gaddafi's regime, but left in its wake a fractured land with no credible central government.³⁰ Finally, these disparate events coalesced in Syria triggering an ongoing civil war from which ISIS burst onto the international scene in 2013.³¹

Kilcullen pulls all of these data points together to argue that Western counterterrorism strategy has failed. He is particularly critical of light foot-print counterterrorism and the Obama administration's tendency to "mistak[e] rhetorical poses for effective policies"³² The former criticism is well-supported; however, the latter is presented in a manner that undermines the author's credibility.

Light foot-print counterterrorism strategy emphasizes drone strikes, "mass electronic surveillance, and . . . special forces raids, rather than large-scale commitment of boots on the ground."³³ While the United States began employing this strategy in 2005,³⁴ it is closely associated with the Obama administration.³⁵ Kilcullen argues that the hands-off and distant approach that is the hallmark of light foot-print counterterrorism has failed because it leads to a power and presence vacuum in the contested territory, results in

¹⁶ *Id.* at 112, 134.

¹⁷ *Id.* at 112.

¹⁸ KILCULLEN, *supra* note 1, at 111-14.

¹⁹ *Id.* at 113, 130.

²⁰ *Id.*

²¹ Ralph Ellis et al., *Orlando Shooting: 49 Killed, Shooter Pledged ISIS Allegiance*, CNN, <http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting> (last updated Jun. 13, 2016).

²² Alissa J. Rubin & Aurelien Breeden, *ISIS Claims Truck Attacker in France Was Its 'Soldier'*, N.Y. TIMES (July 16, 2016), <http://www.nytimes.com/2016/07/17/world/europe/isis-nice-france-attack.html>.

²³ Alissa J. Rubin et al., *Strikes Claimed by ISIS Shut Brussels and Shake European Security*, N.Y. TIMES (Mar. 22, 2016), <http://www.nytimes.com/2016/03/23/world/europe/brussels-airport-explosions.html>.

²⁴ KILCULLEN, *supra* note 1, at 228.

²⁵ *Id.* at 12-14, 21.

²⁶ *Id.* at 50-51, 73-77, 87-90, 228.

²⁷ *Id.* at 57-58, 77.

²⁸ *Id.* at 77.

²⁹ *Id.* at 58.

³⁰ KILCULLEN, *supra* note 1, at 63-64.

³¹ *Id.* at 67, 87-90.

³² *Id.* at 199.

³³ *Id.* at 49.

³⁴ *Id.* at 18-19.

³⁵ "[O]f all drone strikes since 9/11, more than 90 per cent happened during the first six years of the Obama administration, against less than 10 per cent in all eight years under President Bush." *Id.* at 49.

degraded situational awareness, and stirs up resentment in the local population through a lack of local engagement and focus on anonymous killing.³⁶ From the targeted killing of Osama bin Laden providing room for ISIS to emerge onto the international stage, to the overuse of drone strikes stirring up resentment that, combined with the Arab Spring uprisings, provided the fuel jihadists needed to make significant territorial gains across the Middle East and North Africa, Kilcullen effectively demonstrates the failure of light footprint counterterrorism.³⁷

Kilcullen is withering in his criticism of the Obama administration's rhetoric, shifting his tone to that of an almost personal attack in his description of the perceived fecklessness of the administration.³⁸ This is problematic because it appears to undercut the objectivity of his conclusions. Kilcullen served as General David Petraeus' Senior Counter Insurgency Advisor during the Surge and is closely associated with the Bush administration's counterinsurgency strategy.³⁹ As such the reader comes into the book on the lookout for evidence of bias. He acknowledges as much at the beginning of the book where he disclaims any bias.⁴⁰ It would have been more prudent for him to use restraint at these moments because his tone puts the reader on the defensive and undermines his broader argument by injecting the specter of political bias into the book. This is a shame because when you get past the strident tone, Kilcullen makes a persuasive case that the West's counterterrorism strategy has failed.

III. Where the Author Wants Us to Go

While Kilcullen succeeds in proving his thesis as it relates to the failures of Western counterterrorism, his proposed solutions are less persuasive. Kilcullen advocates the following: (1) acknowledge as a nation that our current counterterrorism strategy has failed and that there is no easy or quick solution;⁴¹ (2) rethink strategy through the lens of the threats Kilcullen previously identified;⁴² (3) pursue an active containment strategy that includes working with foreign states to "design and fund systems that work in their own environments";⁴³ and (4) escalate the conflict with ISIS, up to and including a "full-scale, conventional campaign to destroy

ISIS."⁴⁴ The first two recommendations logically flow from Kilcullen's thesis that Western counterterrorism strategy has failed and, as discussed above, are well supported. Less persuasive are his proposals for a new strategy going forward: active containment and escalation. These recommendations, escalation in particular, are problematic because in explaining how we got to where we are, Kilcullen undercuts his proposals for where to go.

First, Kilcullen's narrative portrays the War on Terror as an escalation of commitment problem that is similar to the feedback loop Ball predicted about Vietnam. American support of the Mujahedeen in Afghanistan in the 1980's sowed the seeds for Al Qaeda. The invasion of Iraq, justified in part as a response to terrorist attacks perpetrated by Al Qaeda, helped create AQI.⁴⁵ The 2011 withdrawal from Iraq and killing of Osama bin Laden provided room for AQI to evolve into ISIS.⁴⁶ American intervention in Libya destabilized the region, which helped spark unrest in Syria and the emergence of ISIS on the international stage.⁴⁷ The logical extension of this lesson would be to urge caution because, as Kilcullen himself notes, it can always get worse.⁴⁸ However, instead of caution, Kilcullen advocates for a ground war against ISIS. Neither history nor the facts in *Blood Year* bear that proposition out.

Second, Kilcullen's argument for escalation in Syria is logically inconsistent with his judgment on U.S. intervention in Iraq and Libya. At several points in the book Kilcullen voices the opinion that the invasion of Iraq was a terrible mistake, at one point equating it with Hitler's invasion of Russia.⁴⁹ Kilcullen is also critical of U.S. involvement in Libya, arguing persuasively that our actions destabilized the country by "fatally undermin[ing] Libya's government."⁵⁰ Yet he concludes *Blood Year* by proposing a ground war against ISIS. Kilcullen never resolves the inconsistency between his Iraq/Libya position and his proposed strategy in Syria. This leaves the reader wondering why intervention in Syria is likely to have a different result than U.S. involvement in Iraq and Libya.

This is especially problematic given Russia's presence in Syria. Should we align with the Russians and support Assad, as the author suggests, in the process alienating our Sunni

³⁶ *Id.* at 63-64, 155, 211, 217.

³⁷ *Id.* at 57-58, 63-64, 211.

³⁸ Kilcullen describes President Obama as a "highly partisan politician." *Id.* at 54. He also characterizes the President's comments about the end of Assad's presidency as a "glib declaration." *Id.* at 70. He also describes the President as appearing "feckless." *Id.* at 80. Finally, he characterizes President Obama's actions with respect to ISIS and Syria as a "deer-in-the-headlights response." *Id.* at 194.

³⁹ Kilcullen had a hand in the counterterrorism strategies that he argues have failed. In that way, *Blood Year* acts as a sort of *mea culpa* for Kilcullen. *Id.* at x, 36-37.

⁴⁰ *Id.* at x.

⁴¹ *Id.* at 198, 200.

⁴² *Id.* at 202-11.

⁴³ *Id.* at 209.

⁴⁴ *Id.* at 215.

⁴⁵ *Id.* at 20-22.

⁴⁶ *Id.* at 228.

⁴⁷ *Id.* at 73-79.

⁴⁸ One of Kilcullen's concluding lessons is to "[n]ever think: 'This is as bad as it gets.'" *Id.* at 229.

⁴⁹ *Id.* at 16.

⁵⁰ *Id.* at 64.

allies and strengthening Iran's hand in the region? Or do we oppose Assad and in the process risk open conflict with Russia? And what of the Kurds? In 2016, reports surfaced that the Obama administration was considering arming Kurdish rebels in Syria.⁵¹ What effect would that support have on U.S.–Turkey relations?⁵² Each of these courses of action carry with them immense risk and a great potential for unintended consequences. These crises may well be distinguishable; however, Kilcullen fails to make the argument.

IV. Where Do We Go From Here?

Ultimately, *Blood Year* is a book that every military practitioner should read—not only because it explains the current state of affairs in the Middle East and North Africa, but also because it illustrates how U.S. action can exacerbate an already bad situation. If there are lessons to be drawn from the last fifteen years, they are that control is an illusion and things can always get worse. *Blood Year* illustrates those propositions exceptionally well.

The United States stands at a crossroads in the War on Terror, with implications both at home and abroad. We must face the reality that after fifteen years and countless billions of dollars spent we may well be worse off than we were in 2002. The failures that Kilcullen exposes should give everyone pause. While I question the foundation on which his proposed strategy rests, his voice is nevertheless a valuable part of a conversation that our nation must have. Now that we know how we got here, where do we go? As the United States grapples with this question, our decision makers would do well to revisit Ball's memorandum to President Johnson; the message is as urgent now as it was then.

⁵¹ Eric Schmitt, *Obama Administration Considers Arming Syrian Kurds Against ISIS*, N.Y. TIMES WASHINGTON POST (Sept. 21, 2016), <http://www.nytimes.com/2016/09/22/world/middleeast/obama-syria-kurds-isis-turkey-military-commandos.html>.

⁵² In February 2017 the Washington Post reported that the Trump administration had abandoned Obama administration plans to arm Kurdish fighters in northern Syria, in part over concerns about the impact on U.S. relations with Turkey. See Adam Entous, et. al., *Obama's White House*

Worked for Months on a Plan to Seize Raqqa. Trump's Team Took a Brief Look and Decided Not to Pull the Trigger, WASHINGTON POST (Feb. 2, 2017), https://www.washingtonpost.com/world/national-security/obamas-white-house-worked-for-months-on-a-plan-to-seize-raqqa-trumps-team-deemed-it-hopelessly-inadequate/2017/02/02/116310fa-e71a-11e6-80c2-30e57e57e05d_story.html

The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P
Charlottesville, VA 22903-1781

